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INDEX-DIGEST

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SYMBOLS

ANCAB	----	Alaska Native Claims Appeal Board
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IBSMA	----	Interior Board of Surface Mining and Reclamation Appeals
M	----	Solicitor's Opinion
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
SEC	----	Office of the Secretary

ERRATA

The following three decisions were inadvertently left out of the Quinquennial. They are listed in order along with the topics under which they would be found:

In re Trailhead Timber Sale et al., 97 IBLA 8 (Apr. 20, 1987):  
Timber Sales--Timber Sales and Disposals.

Committee for Idaho's High Desert et al., 108 IBLA 277  
(Apr. 26, 1990): Federal Land Policy and Management Act of  
1976: Rights-of-Way--Federal Land Policy and Management Act of  
1976: Wilderness--Rights-of-Way: Federal Land Policy and  
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Santa Fe Energy Co., 110 IBLA 209 (Aug. 21, 1990):  
Administrative Procedure: Generally--Appeals: Generally--Oil  
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1 IBIA 1 - 2 IBIA 326  
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 89 ----- 98 IBLA 363 (July 31, 1987)  
 215 ----- 101 IBIA 340, 95 I.D. 49 (1988)  
 217 ----- 101 IBIA 340, 95 I.D. 49 (1988)  
 391 ----- 87 IBLA 247 (June 20, 1985)  
       93 IBLA 221 (Aug. 20, 1986)  
       112 IBLA 228 (Dec. 19, 1989)  
 796 ----- 98 IBLA 363 (July 31, 1987)  
 854 ----- 97 IBLA 126 (Apr. 30, 1987)  
       M-36963, 96 I.D. 331 (1989)  
 1095 ----- 94 IBLA 107 (Oct. 7, 1986)  
       96 IBLA 42 (Feb. 27, 1987)  
       102 IBLA 357 (June 10, 1988)  
       106 IBLA 230, 95 I.D. 314 (1988)  
 1097 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
       108 IBLA 328 (May 1, 1989)  
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 612 ----- 13 IBIA 211, 92 I.D. 309 (1985)

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 685 ----- 101 IBLA 340, 95 I.D. 49 (1988)  
 693 ----- 13 IBIA 211, 92 I.D. 309 (1985)

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       102 IBLA 357 (June 10, 1988)  
 35 ----- 102 IBLA 357 (June 10, 1988)  
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       86 IBLA 350, 92 I.D. 208 (1985)  
       102 IBLA 357 (June 10, 1988)  
       103 IBLA 316 (Aug. 5, 1988)  
 62 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
       111 IBLA 1, 96 I.D. 408 (1989)  
 83 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 87 ----- 111 IBLA 1, 96 I.D. 408 (1989)  
 121 ----- 90 IBLA 83 (Dec. 20, 1985)  
 121-123 ----- 96 IBLA 42 (Feb. 27, 1987)  
 181 ----- 97 IBLA 45, 94 I.D. 139 (1987)  
 388 ----- 99 IBIA 16 (Aug. 14, 1987)  
 409 ----- 96 IBLA 209 (Mar. 19, 1987)  
       106 IBLA 230, 95 I.D. 314 (1988)  
 413 ----- 85 IBLA 74 (Feb. 11, 1985)  
       85 IBLA 206, 92 I.D. 109 (1985)  
       103 IBLA 104 (July 13, 1988)  
       106 IBLA 230, 95 I.D. 314 (1988)  
 413-414 ----- 106 IBLA 30, 95 I.D. 314 (1988)  
 495 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
       96 IBLA 198 (Mar. 19, 1987)  
 567 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 862 ----- 95 IBIA 291 (Jan. 29, 1987)  
 884 ----- 104 IBIA 377 (Sept. 27, 1988)  
 990 ----- 15 IBIA 220, 94 I.D. 353 (1987)

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 321 ----- 86 IBLA 215 (Apr. 30, 1985)  
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 330 ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 505 ----- 86 IBLA 215 (Apr. 30, 1985)  
 588 ----- 86 IBLA 149 (Apr. 25, 1985)  
 614 ----- 86 IBLA 149 (Apr. 25, 1985)  
 657 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 790 ----- 87 IBLA 236 (June 19, 1985)  
 794 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 848 ----- 96 IBLA 198 (Mar. 19, 1987)  
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 ----- 96 IBIA 42 (Feb. 27, 1987)  
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 ----- 17 IBIA 129 (May 17, 1989)  
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 712 ----- 87 IBIA 247 (June 20, 1985)  
 714 ----- 86 IBIA 135, 92 I.D. 153 (1985)  
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 741 ----- 104 IBLA 389 (Oct. 3, 1988)  
 1026 ----- 98 IBLA 358 (July 31, 1987)  
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 1364 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
 103 IBLA 104 (July 13, 1988)  
 106 IBLA 230, 95 I.D. 314 (1988)

## 45 STAT:

1091 ----- 108 IBLA 181 (Apr. 13, 1989)  
 1478 ----- 14 IBLA 217 (Aug. 8, 1986)  
 1562 ----- M-36960, 96 I.D. 1 (1989)

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 103 IBLA 316 (Aug. 5, 1988)  
 822 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
 860 ----- M-36960, 96 I.D. 1 (1989)  
 1007 ----- 99 IBLA 53, 94 I.D. 394 (1987)  
 1092 ----- 94 IBLA 93 (Oct. 1, 1986)  
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 987 ----- 14 IBLA 3, 93 I.D. 13 (1986)  
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 1185 ----- 95 IBLA 291 (Jan. 29, 1987)  
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 500 ----- 88 IBLA 66, 92 I.D. 317 (1985)  
 571 ----- M-36960, 96 I.D. 1 (1989)  
 674 ----- 99 IBLA 53, 94 I.D. 394 (1987)  
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 1967 ----- 13 IBLA 211, 92 I.D. 309 (1985)  
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 98 IBLA 128 (June 19, 1987)

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 506 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
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 507 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
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 781 ----- 100 IBLA 37 (Nov. 19, 1987)  
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 556(e) ----- 92 IBLA 109, 93 I.D. 211 (1986)  
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 557(b) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
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 557(d)(1)(A)- 92 IBLA 109, 93 I.D. 211 (1986)  
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 757(j)(1) --- 109 IBLA 147 (June 8, 1989)  
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 3317(c) ----- 110 IBLA 282, 96 I.D. 367 (1989)  
 3317(c)(1) --- 110 IBLA 282, 96 I.D. 367 (1989)  
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 3318 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
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 3320(a) ----- 105 IBLA 392 (Nov. 30, 1988)  
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 470cc ----- 110 IBLA 57 (July 13, 1989)  
 470cc(f) ----- 96 IBLA 356, 94 I.D. 132 (1987)  
 470ee(a) ----- 96 IBLA 356, 94 I.D. 132 (1987)  
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sec. 618(a)(1) --- 100 IBLA 176 (Dec. 8, 1987)  
 618(a)(2)(B)- 100 IBLA 176 (Dec. 8, 1987)  
 618(a)(2)(D)- 100 IBLA 176 (Dec. 8, 1987)  
 618(a)(6)(B)- 100 IBLA 176 (Dec. 8, 1987)  
 661 ----- 6 OHA 52 (June 28, 1985)  
 661-666(c) -- 6 OHA 52 (June 28, 1985)  
 668-668(d) -- 6 OHA 86 (Nov. 8, 1985)  
 668 et seq. - 7 OHA 1 (Sept. 23, 1986)  
 668a ----- 16 IBIA 125 (May 12, 1988)  
 668b ----- 6 OHA 86 (Nov. 8, 1985)  
 668dd ----- 6 OHA 52 (June 28, 1985)  
 668dd-668ee - M-36914 (Supp. III), 96 I.D. 211 (1989)  
 668dd(a)(1) - 6 OHA 52 (June 28, 1985)  
                   Secy Order, 94 I.D. 339 (1987)  
 668dd(a)(1) (A) ----- Secy Order, 94 I.D. 339 (1987)  
 668dd(d) ---- 6 OHA 52 (June 28, 1985)  
 668dd(d)(2) - 6 OHA 52 (June 28, 1985)  
 670g ----- 85 IBLA 185 (Feb. 26, 1985)  
 670h ----- 85 IBLA 185 (Feb. 26, 1985)  
 670h(a)(1) -- 85 IBLA 185 (Feb. 26, 1985)  
 670h(c)(1) (A) ----- 85 IBLA 185 (Feb. 26, 1985)  
 670h(c)(3) (D) ----- 85 IBLA 185 (Feb. 26, 1985)  
 688dd(i) ---- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 698f et seq.- 6 OHA 128 (Mar. 24, 1986)  
 701 ----- 101 IBLA 234 (Feb. 29, 1988)  
 701-715s ---- 104 IBLA 382 (Oct. 3, 1988)  
 703 ----- 110 IBLA 67 (July 20, 1989)  
 704 ----- 101 IBLA 234 (Feb. 29, 1988)  
 715 et seq. - 6 OHA 52 (June 28, 1985)  
 715s ----- 6 OHA 52 (June 28, 1985)  
 715s(c) ---- 94 IBLA 78 (Sept. 30, 1986)  
 718 et seq. - 6 OHA 52 (June 28, 1985)  
 742b(a) ---- M-36960, 96 I.D. 1 (1989)  
 742(j)-1(a) - 8 OHA 19 (Jan. 13, 1989)  
 791 ----- 90 IBLA 135, 92 I.D. 620 (1985)  
 791a ----- 85 IBLA 241 (Mar. 4, 1985)  
 791a-825r --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 791a et seq.- 87 IBLA 126 (June 5, 1985)  
 797(e) ----- 6 OHA 52 (June 28, 1985)  
 797(f) ----- 108 IBLA 330 (May 2, 1989)  
 803(e) ----- 6 OHA 52 (June 28, 1985)  
 818 ----- 86 IBLA 16 (Mar. 29, 1985)  
                   88 IBLA 273 (Sept. 5, 1985)  
                   90 IBLA 135, 92 I.D. 620 (1985)  
                   93 IBLA 346 (Sept. 11, 1986)  
                   99 IBLA 16 (Aug. 14, 1987)  
                   100 IBLA 50, 94 I.D. 422 (1987)  
                   102 IBLA 175 (May 3, 1988)  
                   102 IBLA 256, 95 I.D. 64 (1988)  
                   106 IBLA 327 (Jan. 9, 1989)  
                   108 IBLA 330 (May 2, 1989)  
                   110 IBLA 245 (Aug. 31, 1989)  
                   112 IBLA 233 (Dec. 20, 1989)  
 821 ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 824(a) ----- 6 OHA 52 (June 28, 1985)  
 1131 ----- 85 IBLA 54 (Feb. 11, 1985)  
                   101 IBLA 45 (Jan. 26, 1988)  
                   103 IBLA 255 (July 27, 1988)  
                   M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1131-1136 --- 98 IBLA 272 (July 10, 1987)  
                   101 IBLA 315 (Mar. 17, 1988)  
                   102 IBLA 385 (June 17, 1988)  
                   109 IBLA 391 (June 26, 1989)  
 1131 et seq. - M-36914 (Supp. III), 96 I.D. 211 (1989)

## TITLE 16: (Cont.)

sec. 1131(a) ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
                   M-36963, 96 I.D. 331 (1989)  
 1131(b) ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1131(c) ----- 102 IBLA 385 (June 17, 1988)  
 1132 ----- 6 OHA 113 (Jan. 2, 1986)  
                   M-36914 (Supp. III), 96 I.D. 211 (1989)  
                   Secy Order, 94 I.D. 339 (1987)  
 1132(a) ----- 104 IBLA 269 (Sept. 13, 1988)  
 1132(e) ----- M-36963, 96 I.D. 331 (1989)  
 1133 ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1133(a)(1) --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1133(a)(3) --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1133(b) ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
                   Secy Order, 94 I.D. 339 (1987)  
 1133(c) ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
                   6 OHA 113 (Jan. 2, 1986)  
 1133(d)(3) --- 103 IBLA 255 (July 27, 1988)  
                   109 IBLA 264 (June 16, 1989)  
 1133(d)(4) --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1133(d)(6) --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1133(d)(7) --- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1241 ----- 90 IBLA 273 (Feb. 5, 1986)  
 1241-1251 ---- 90 IBLA 273 (Feb. 5, 1986)  
                   95 IBLA 261 (Jan. 27, 1987)  
 1244(a)(7) --- 90 IBLA 273 (Feb. 5, 1986)  
 1246(h) ----- 90 IBLA 273 (Feb. 5, 1986)  
                   95 IBLA 261 (Jan. 27, 1987)  
                   98 IBLA 203 (June 29, 1987)  
 1246(h)(2) --- 95 IBLA 261 (Jan. 27, 1987)  
 1271 ----- 90 IBLA 112 (Dec. 23, 1985)  
 1271-1278 ---- 93 IBLA 103 (July 23, 1986)  
                   94 IBLA 374 (Dec. 4, 1986)  
                   106 IBLA 304 (Jan. 5, 1989)  
                   106 IBLA 317 (Jan. 6, 1989)  
                   107 IBLA 71 (Jan. 30, 1989)  
 1271 et seq. - 90 IBLA 112 (Dec. 23, 1985)  
                   M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1273 ----- 106 IBLA 304 (Jan. 5, 1989)  
                   107 IBLA 71 (Jan. 30, 1989)  
 1274 ----- 106 IBLA 317 (Jan. 6, 1989)  
 1274(a) ----- 106 IBLA 317 (Jan. 6, 1989)  
 1274(a)(5) --- 93 IBLA 103 (July 23, 1986)  
                   100 IBLA 151 (Dec. 3, 1987)  
                   104 IBLA 322 (Sept. 20, 1988)  
 1274(b) ----- 106 IBLA 317 (Jan. 6, 1989)  
 1274(14) ----- 106 IBLA 317 (Jan. 6, 1989)  
 1276(a)(13) -- 106 IBLA 317 (Jan. 6, 1989)  
 1279 ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1280 ----- 106 IBLA 317 (Jan. 6, 1989)  
 1280(a) ----- 106 IBLA 304 (Jan. 5, 1989)  
 1280(a)(i) --- 106 IBLA 317 (Jan. 6, 1989)  
 1280(a)(iii) - 107 IBLA 71 (Jan. 30, 1989)  
                   109 IBLA 198, 96 I.D. 272 (1989)  
 1284 ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1284(b) ----- M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1331 ----- 92 IBLA 200 (June 12, 1986)  
                   111 IBLA 339 (Oct. 31, 1989)  
 1331-1340 ---- 101 IBLA 45 (Jan. 26, 1988)

## (B) United States Codes

## TITLE 16: (Cont.)

sec. 1331-1340 ---- 111 IBLA 332 (Oct. 31, 1989)  
 111 IBLA 339 (Oct. 31, 1989)  
 1332(c) ----- 111 IBLA 339 (Oct. 31, 1989)  
 1332(f) ----- 109 IBLA 112 (June 7, 1989)  
 111 IBLA 332 (Oct. 31, 1989)  
 111 IBLA 339 (Oct. 31, 1989)  
 1333 ----- 101 IBLA 45 (Jan. 26, 1988)  
 1333(a) ----- 101 IBLA 45 (Jan. 26, 1988)  
 111 IBLA 332 (Oct. 31, 1989)  
 111 IBLA 339 (Oct. 31, 1989)  
 1333(b) ----- 109 IBLA 112 (June 7, 1989)  
 111 IBLA 339 (Oct. 31, 1989)  
 1333(b)(1) --- 111 IBLA 332 (Oct. 31, 1989)  
 1333(b)(2) --- 106 IBLA 201 (Dec. 21, 1988)  
 109 IBLA 112 (June 7, 1989)  
 111 IBLA 332 (Oct. 31, 1989)  
 111 IBLA 339 (Oct. 31, 1989)  
 1333(b)(2)(B)- 101 IBLA 45 (Jan. 26, 1988)  
 102 IBLA 224 (May 11, 1988)  
 108 IBLA 354 (May 12, 1989)  
 1333(b)(3) --- 111 IBLA 332 (Oct. 31, 1989)  
 1333(c) ----- 101 IBLA 45 (Jan. 26, 1988)  
 101 IBLA 116 (Feb. 8, 1988)  
 102 IBLA 224 (May 11, 1988)  
 106 IBLA 201 (Dec. 21, 1988)  
 108 IBLA 354 (May 12, 1989)  
 1333(d)(1) --- 101 IBLA 45 (Jan. 26, 1988)  
 1333(d)(3) --- 101 IBLA 315 (Mar. 17, 1988)  
 1335 ----- 94 IBLA 308 (Nov. 21, 1986)  
 1340 ----- 109 IBLA 112 (June 7, 1989)  
 1361-1407 ---- 6 OHA 146 (June 27, 1986)  
 7 OHA 241 (Sept. 19, 1988)  
 1361 et seq. - 7 OHA 241 (Sept. 19, 1988)  
 1371 ----- 6 OHA 146 (June 27, 1986)  
 1372 ----- 6 OHA 146 (June 27, 1986)  
 1372(a)(4) --- 6 OHA 146 (June 27, 1986)  
 1375 ----- 6 OHA 146 (June 27, 1986)  
 1375(a) ----- 6 OHA 146 (June 27, 1986)  
 1377(e)(4) --- 6 OHA 146 (June 27, 1986)  
 1393(f) ----- 86 IBLA 85 (Apr. 11, 1985)  
 1431 et seq. - M-36952, 92 I.D. 459 (1985)  
 1432(a) ----- M-36952, 92 I.D. 459 (1985)  
 1432(g) ----- M-36952, 92 I.D. 459 (1985)  
 1453(13) ----- M-36952, 92 I.D. 459 (1985)  
 1456(c)(1) --- 85 IBLA 185 (Feb. 26, 1985)  
 1531 ----- 88 IBLA 133 (Aug. 9, 1985)  
 104 IBLA 141 (Sept. 2, 1988)  
 1531-1536 ---- 104 IBLA 76 (Aug. 29, 1988)  
 1531-1543 ---- 104 IBLA 382 (Oct. 3, 1988)  
 1531 et seq. - 6 OHA 84 (Sept. 24, 1985)  
 1535 ----- 85 IBLA 185 (Feb. 26, 1985)  
 1536 ----- 85 IBLA 185 (Feb. 26, 1985)  
 88 IBLA 7 (June 28, 1985)  
 1536(a)(1) --- 104 IBLA 76 (Aug. 29, 1988)  
 1536(a)(2) --- 88 IBLA 133 (Aug. 9, 1985)  
 103 IBLA 247 (July 26, 1988)  
 104 IBLA 76 (Aug. 29, 1988)  
 110 IBLA 67 (July 20, 1989)  
 1536(c)(1) --- 102 IBLA 137 (Apr. 25, 1988)  
 104 IBLA 382 (Oct. 3, 1988)  
 1536(h) ----- 88 IBLA 133 (Aug. 9, 1985)  
 1538-1540 ---- 6 OHA 75 (July 1, 1985)  
 1538(a)(1)(D)- 6 OHA 84 (Sept. 24, 1985)  
 1539 ----- 111 IBLA 107 (Sept. 28, 1989)  
 1600 ----- 88 IBLA 133 (Aug. 9, 1985)  
 1634(a)(6) --- 91 IBLA 305 (Apr. 15, 1986)  
 1801 et seq.--- M-36952, 92 I.D. 459 (1985)  
 1802(3) ----- M-36952, 92 I.D. 459 (1985)  
 1802(4) ----- M-36952, 92 I.D. 459 (1985)  
 1802(13) ----- M-36952, 92 I.D. 459 (1985)  
 1812 ----- M-36952, 92 I.D. 459 (1985)  
 1812(2) ----- M-36952, 92 I.D. 459 (1985)  
 1821(a) ----- M-36952, 92 I.D. 459 (1985)  
 1821(b) ----- M-36952, 92 I.D. 459 (1985)  
 1821(c) ----- M-36952, 92 I.D. 459 (1985)

## TITLE 16: (Cont.)

sec. 1821(j) ----- M-36952, 92 I.D. 459 (1985)  
 1822 ----- M-36952, 92 I.D. 459 (1985)  
 1856(a) ----- M-36952, 92 I.D. 459 (1985)  
 1881 ----- M-36952, 92 I.D. 459 (1985)  
 1901-1912 ---- 95 IBLA 44 (Dec. 19, 1986)  
 2601 ----- 108 IBLA 20, 96 I.D. 127 (1989)  
 3101 ----- 88 IBLA 336 (Sept. 19, 1985)  
 3101(c) ----- 90 IBLA 163 (Jan. 8, 1986)  
 3111 ----- 90 IBLA 163 (Jan. 8, 1986)  
 3111-3126 ---- 90 IBLA 163 (Jan. 8, 1986)  
 3112 ----- 90 IBLA 163 (Jan. 8, 1986)  
 3113 ----- 94 IBLA 38 (Sept. 25, 1986)  
 3120(a) ----- 88 IBLA 210 (Aug. 28, 1985)  
 3120(c) ----- 90 IBLA 163 (Jan. 8, 1986)  
 3148(d) ----- 93 IBLA 97 (July 22, 1986)  
 96 IBLA 1 (Feb. 25, 1987)  
 3183 ----- 89 IBLA 341 (Nov. 13, 1985)  
 3183(a)(2) --- 86 IBLA 85 (Apr. 11, 1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 3183(b) ----- 86 IBLA 85 (Apr. 11, 1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 3183(f) ----- 89 IBLA 341 (Nov. 13, 1985)  
 3192 ----- Secy Order, 94 I.D. 339 (1987)  
 3193(b)(2) --- 6 OHA 113 (Jan. 2, 1986)  
 3204(a) ----- 6 OHA 113 (Jan. 2, 1986)  
 3209 ----- 87 IBLA 96 (May 30, 1985)  
 88 IBLA 336 (Sept. 19, 1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 3214 ----- 99 IBLA 201 (Oct. 13, 1987)  
 3215 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
 95 IBLA 216 (Jan. 14, 1987)  
 3215(a) ----- 111 IBLA 77 (Sept. 26, 1989)  
 3215(a)  
 (3)(b) ----- 111 IBLA 77 (Sept. 26, 1989)  
 3371-3378 ---- 6 OHA 36 (June 13, 1985)  
 6 OHA 125 (Jan. 15, 1986)  
 8 OHA 19 (Jan. 13, 1989)  
 3371 et seq. - 6 OHA 29 (May 15, 1985)  
 6 OHA 77 (July 29, 1985)  
 7 OHA 229 (Aug. 11, 1988)  
 3372(a)(1) --- 8 OHA 19 (Jan. 13, 1989)  
 3372(a)(2)(A)- 7 OHA 229 (Aug. 11, 1988)  
 8 OHA 19 (Jan. 13, 1989)  
 3373(a)(1) --- 7 OHA 229 (Aug. 11, 1988)  
 8 OHA 19 (Jan. 13, 1989)  
 8251(b) ----- 6 OHA 52 (June 28, 1985)

## TITLE 18:

sec. 43 ----- 6 OHA 21 (Mar. 8, 1985)  
 205 ----- 92 IBLA 107 (May 30, 1986)  
 207 ----- 15 IBLA 40 (Oct. 30, 1986)  
 207(b)(1) --- IBCA-2654-F (Sept. 6, 1989)  
 208 ----- 15 IBLA 40 (Oct. 30, 1986)  
 401(3) ----- 104 IBLA 114 (Aug. 31, 1988)  
 402 ----- 104 IBLA 114 (Aug. 31, 1988)  
 431 ----- 85 IBLA 77, 92 I.D. 83 (1985)  
 1001 ----- 85 IBLA 394 (Mar. 28, 1985)  
 87 IBLA 93 (May 30, 1985)  
 95 IBLA 26 (Dec. 12, 1986)  
 96 IBLA 35 (Feb. 27, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 101 IBLA 272 (Mar. 10, 1988)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 1151 ----- 13 IBLA 264 (Sept. 26, 1985)  
 17 IBLA 39 (Jan. 23, 1989)  
 109 IBLA 40, 96 I.D. 239 (1989)  
 1162 ----- 13 IBLA 264 (Sept. 26, 1985)  
 16 IBLA 62 (Mar. 21, 1988)  
 1905 ----- 110 IBLA 154 (Aug. 11, 1989)

## TITLE 20:

sec. 207(a) ----- 95 IBLA 16 (Dec. 12, 1986)



## TITLE 23:

sec. 18 ----- 96 IBLA 290 (Mar. 31, 1987)  
 101 et seq. - 100 IBLA 7 (Nov. 13, 1987)  
 312-318 ----- 15 IBLA 124 (Mar. 2, 1987)  
 317 ----- 85 IBLA 170 (Feb. 26, 1985)  
 86 IBLA 268 (May 10, 1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 90 IBLA 273 (Feb. 5, 1986)  
 96 IBLA 290 (Mar. 31, 1987)  
 97 IBLA 229 (May 11, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 110 IBLA 224 (Aug. 24, 1989)

## TITLE 25:

sec. 1a ----- 17 IBIA 144 (June 21, 1989)  
 2 ----- M-36960, 96 I.D. 1 (1989)  
 13 ----- 14 IBIA 3, 93 I.D. 13 (1986)  
 16 IBIA 125 (May 12, 1988)  
 18 IBIA 50 (Nov. 8, 1989)  
 18 IBIA 98 (Dec. 27, 1989)  
 44 ----- 13 IBIA 99, 92 I.D. 99 (1985)  
 14 IBIA 3, 93 I.D. 13 (1986)  
 45 ----- 13 IBIA 99, 92 I.D. 99 (1985)  
 14 IBIA 3, 93 I.D. 13 (1986)  
 M-36960, 96 I.D. 1 (1989)  
 46 ----- 13 IBIA 99, 92 I.D. 99 (1985)  
 14 IBIA 3, 93 I.D. 13 (1986)  
 47 ----- IBCA-2578-F, 2579-F (Dec. 22, 1989)  
 13 IBIA 99, 92 I.D. 99 (1985)  
 14 IBIA 3, 93 I.D. 13 (1986)  
 16 IBIA 125 (May 12, 1988)  
 17 IBIA 286 (Sept. 14, 1989)  
 70 ----- M-36963, 96 I.D. 331 (1989)  
 81 ----- 13 IBIA 150 (May 21, 1985)  
 16 IBIA 51 (Mar. 18, 1988)  
 16 IBIA 62 (Mar. 21, 1988)  
 17 IBIA 241 (Aug. 24, 1989)  
 17 IBIA 250 (Aug. 24, 1989)  
 17 IBIA 258 (Aug. 25, 1989)  
 18 IBIA 7 (Oct. 5, 1989)  
 81-82 ----- 16 IBIA 51 (Mar. 18, 1988)  
 81-84 ----- 16 IBIA 51 (Mar. 18, 1988)  
 82 ----- 16 IBIA 51 (Mar. 18, 1988)  
 162a ----- 17 IBIA 97 (Mar. 28, 1989)  
 164 ----- 15 IBIA 277 (Sept. 25, 1987)  
 181 ----- 17 IBIA 72 (Feb. 15, 1989)  
 202 ----- 13 IBIA 200 (July 19, 1985)  
 211 ----- M-36963, 96 I.D. 331 (1989)  
 229 ----- 13 IBIA 276 (Oct. 10, 1985)  
 261 ----- 16 IBIA 138 (June 6, 1988)  
 261-264 ----- 16 IBIA 138 (June 6, 1988)  
 262 ----- 16 IBIA 138 (June 6, 1988)  
 274 ----- 13 IBIA 99, 92 I.D. 99 (1985)  
 280a ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 293a ----- 17 IBIA 218 (Aug. 3, 1989)  
 297 ----- 14 IBIA 3, 93 I.D. 13 (1986)  
 309 ----- 18 IBIA 92 (Dec. 22, 1989)  
 311-328 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 312 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 312-318 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 313 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 315 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 317 ----- 99 IBLA 22 (Aug. 25, 1987)  
 321 ----- 15 IBIA 124 (Mar. 2, 1987)  
 323-328 ----- 15 IBIA 124 (Mar. 2, 1987)  
 18 IBIA 54 (Nov. 14, 1989)  
 324 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 331 ----- 16 IBIA 104 (Apr. 4, 1988)  
 85 IBLA 343, 92 I.D. 140 (1985)  
 93 IBLA 147 (July 30, 1986)  
 100 IBLA 70 (Nov. 30, 1987)  
 331-358 ----- 13 IBIA 211, 92 I.D. 309 (1985)

## TITLE 25: (Cont.)

sec. 334 ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 99 IBLA 170 (Oct. 2, 1987)  
 100 IBLA 70 (Nov. 30, 1987)  
 103 IBLA 375 (Aug. 15, 1988)  
 336 ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 103 IBLA 375 (Aug. 15, 1988)  
 337 ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 93 IBLA 147 (July 30, 1986)  
 339 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 96 IBLA 198 (Mar. 19, 1987)  
 348 ----- 13 IBIA 200 (July 19, 1985)  
 16 IBIA 100 (Mar. 30, 1988)  
 16 IBIA 148 (June 15, 1988)  
 17 IBIA 72 (Feb. 15, 1989)  
 349 ----- 96 IBLA 198 (Mar. 19, 1987)  
 371 ----- 14 IBIA 223 (Aug. 8, 1986)  
 372 ----- 13 IBIA 69 (Jan. 7, 1985)  
 13 IBIA 296, 92 I.D. 509 (1985)  
 14 IBIA 223 (Aug. 8, 1986)  
 16 IBIA 148 (June 15, 1988)  
 17 IBIA 72 (Feb. 15, 1989)  
 372-373 ----- 16 IBIA 45 (Mar. 17, 1988)  
 17 IBIA 29 (Dec. 14, 1988)  
 372a ----- 13 IBIA 264 (Sept. 26, 1985)  
 16 IBIA 4 (Nov. 16, 1987)  
 16 IBIA 213 (Sept. 20, 1988)  
 372a(1)(C) -- 16 IBIA 4 (Nov. 16, 1987)  
 16 IBIA 213 (Sept. 20, 1988)  
 372a(2) ----- 16 IBIA 213 (Sept. 20, 1988)  
 373 ----- 13 IBIA 140 (Mar. 28, 1985)  
 13 IBIA 296, 92 I.D. 509 (1985)  
 16 IBIA 148 (June 15, 1988)  
 375 ----- 13 IBIA 331 (Dec. 4, 1985)  
 14 IBIA 106 (Apr. 4, 1986)  
 378 ----- 13 IBIA 344, 92 I.D. 628 (1985)  
 18 IBIA 16 (Oct. 5, 1989)  
 380 ----- 16 IBIA 169 (July 14, 1988)  
 385 ----- 17 IBIA 65 (Feb. 15, 1989)  
 396a ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 91 IBLA 208, 93 I.D. 159 (1986)  
 396a-396g --- 91 IBLA 208, 93 I.D. 159 (1986)  
 396c ----- 91 IBLA 208, 93 I.D. 159 (1986)  
 396d ----- 91 IBLA 208, 93 I.D. 159 (1986)  
 398d ----- M-36963, 96 I.D. 331 (1989)  
 409a ----- 17 IBIA 198 (July 26, 1989)  
 415 ----- 13 IBIA 276 (Oct. 10, 1985)  
 15 IBIA 220, 94 I.D. 353 (1987)  
 15 IBIA 286 (Sept. 29, 1987)  
 17 IBIA 231 (Aug. 18, 1989)  
 17 IBIA 231 (Aug. 18, 1989)  
 448-492 ----- 16 IBIA 201 (Aug. 18, 1988)  
 450 ----- IBCA-2417, 96 I.D. 148 (1989)  
 14 IBIA 71 (Feb. 26, 1986)  
 450-450n ---- 13 IBIA 296, 92 I.D. 509 (1985)  
 14 IBIA 71 (Feb. 26, 1986)  
 14 IBIA 87 (Apr. 4, 1986)  
 14 IBIA 187 (July 25, 1986)  
 15 IBIA 77 (Dec. 29, 1986)  
 16 IBIA 2 (Nov. 12, 1987)  
 18 IBIA 92 (Dec. 22, 1989)  
 450 et seq. - 17 IBIA 258 (Aug. 25, 1989)  
 450a ----- 14 IBIA 71 (Feb. 26, 1986)  
 17 IBIA 258 (Aug. 25, 1989)  
 450b(a) ----- 16 IBIA 125 (May 12, 1988)  
 450b(b) ----- 16 IBIA 125 (May 12, 1988)  
 450e-1 ----- IBCA-1953, 94 I.D. 101 (1987)  
 450f ----- IBCA-2578-F, 2579-F (Dec. 22, 1989)  
 18 IBIA 5 (Oct. 3, 1989)  
 450f-450n --- IBCA-1953, 94 I.D. 101 (1987)  
 15 IBIA 147, 94 I.D. 120 (1987)  
 17 IBIA 21 (Dec. 7, 1988)  
 17 IBIA 39 (Jan. 23, 1989)  
 7 OHA 56 (Mar. 27, 1987)

## (B) United States Codes

## TITLE 25: (Cont.)

sec. 450f(a)(2) -- 17 IBIA 39 (Jan. 23, 1989)  
 450h ----- 14 IBIA 71 (Feb. 26, 1986)  
               17 IBIA 118 (Apr. 17, 1989)  
 450j(h) ----- IBCA-1953, 94 I.D. 101 (1987)  
               15 IBIA 147, 94 I.D. 120 (1987)  
 450k(c) ----- IBCA-1968 et al., 92 I.D. 255 (1985)  
 455-457 ----- 16 IBIA 2 (Nov. 12, 1987)  
 461 ----- 16 IBIA 104 (Apr. 4, 1988)  
 461-479 ----- 14 IBIA 46, 93 I.D. 79 (1986)  
               14 IBIA 260 (Sept. 10, 1986)  
               15 IBIA 40 (Oct. 30, 1986)  
               15 IBIA 142 (Mar. 27, 1987)  
               15 IBIA 203, 94 I.D. 199 (1987)  
               15 IBIA 220, 94 I.D. 353 (1987)  
               15 IBIA 263 (Aug. 12, 1987)  
               16 IBIA 51 (Mar. 18, 1988)  
               16 IBIA 104 (Apr. 4, 1988)  
               16 IBIA 180 (July 22, 1988)  
               17 IBIA 144 (June 21, 1989)  
               17 IBIA 192, 96 I.D. 328 (1989)  
               17 IBIA 296 (Sept. 21, 1989)  
               17 IBIA 304 (Sept. 22, 1989)  
 464 ----- 91 IBLA 208, 93 I.D. 159 (1986)  
               15 IBIA 142 (Mar. 27, 1987)  
               15 IBIA 203, 94 I.D. 199 (1987)  
               17 IBIA 72 (Feb. 15, 1989)  
               18 IBIA 40 (Oct. 31, 1989)  
 465 ----- 13 IBIA 339 (Dec. 16, 1985)  
               17 IBIA 192, 96 I.D. 328 (1989)  
               17 IBIA 198 (July 26, 1989)  
               17 IBIA 204 (July 26, 1989)  
               18 IBIA 67 (Dec. 5, 1989)  
 467 ----- 18 IBIA 67 (Dec. 5, 1989)  
 472 ----- M-36960, 96 I.D. 1 (1989)  
 474 ----- 13 IBIA 132 (Mar. 6, 1985)  
               13 IBIA 182 (June 12, 1985)  
               13 IBIA 307 (Oct. 29, 1985)  
 476 ----- IBCA-1962 & 1966, 93 I.D. 136  
               (1986)  
               13 IBIA 150 (May 21, 1985)  
               14 IBIA 30 (Feb. 12, 1986)  
               14 IBIA 46, 93 I.D. 79 (1986)  
               15 IBIA 40 (Oct. 30, 1986)  
               15 IBIA 220, 94 I.D. 353 (1987)  
               15 IBIA 263 (Aug. 12, 1987)  
               16 IBIA 51 (Mar. 18, 1988)  
               17 IBIA 39 (Jan. 23, 1989)  
               17 IBIA 124 (May 15, 1989)  
               17 IBIA 144 (June 21, 1989)  
               17 IBIA 169 (July 6, 1989)  
               17 IBIA 241 (Aug. 24, 1989)  
               17 IBIA 250 (Aug. 24, 1989)  
               17 IBIA 299 (Sept. 21, 1989)  
 477 ----- 15 IBIA 40 (Oct. 30, 1986)  
               17 IBIA 144 (June 21, 1989)  
               17 IBIA 258 (Aug. 25, 1989)  
 477 et seq. - 17 IBIA 39 (Jan. 23, 1989)  
 478 ----- 17 IBIA 72 (Feb. 15, 1989)  
 478(b) ----- 16 IBIA 104 (Apr. 4, 1988)  
 479 ----- 14 IBIA 3, 93 I.D. 13 (1986)  
               15 IBIA 203, 94 I.D. 199 (1987)  
 483 ----- 13 IBIA 344, 92 I.D. 628 (1985)  
 483a ----- 17 IBIA 152 (June 21, 1989)  
 501 ----- 17 IBIA 198 (July 26, 1989)  
 501-509 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 501-510 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 503 ----- 13 IBIA 302 (Oct. 25, 1985)  
 509 ----- 13 IBIA 211, 92 I.D. 309 (1985)  
 553 ----- 16 IBIA 51 (Mar. 18, 1988)  
 564-564x ---- 13 IBIA 344, 92 I.D. 628 (1985)  
 564g(b) ----- 13 IBIA 344, 92 I.D. 628 (1985)  
 640-26(b) --- 90 IBLA 200 (Jan. 30, 1986)

## TITLE 25: (Cont.)

sec. 640d ----- 91 IBLA 80 (Mar. 10, 1986)  
 640d-8 ----- 91 IBLA 80 (Mar. 10, 1986)  
 640d-9(c) --- 15 IBIA 179, 94 I.D. 172 (1987)  
 640d-10 ----- 16 IBIA 208 (Aug. 30, 1988)  
               90 IBLA 200 (Jan. 30, 1986)  
 640d-10(a) -----  
   (1) ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-10(a) -----  
   (2) ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-10(b) --- 90 IBLA 200 (Jan. 30, 1986)  
 640d-10(c) --- 90 IBLA 200 (Jan. 30, 1986)  
 640d-10(f) -----  
   (1) ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-10(f) -----  
   (3) ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-12 ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-12(c) -----  
   (2) ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-13 ----- 90 IBLA 200 (Jan. 30, 1986)  
 640d-15 ----- 15 IBIA 179, 94 I.D. 172 (1987)  
 640d-15(a) --- 15 IBIA 179, 94 I.D. 172 (1987)  
 640d-28 ----- 15 IBIA 179, 94 I.D. 172 (1987)  
 903-903f ---- 15 IBIA 263 (Aug. 12, 1987)  
 903a ----- 15 IBIA 263 (Aug. 12, 1987)  
 903a(a) ----- 15 IBIA 263 (Aug. 12, 1987)  
 954 ----- 13 IBIA 150 (May 21, 1985)  
 1300b-11 ----- 13 IBIA 339 (Dec. 16, 1985)  
 1300b-14 ----- 13 IBIA 339 (Dec. 16, 1985)  
 1301-1303 ---- 14 IBIA 71 (Feb. 26, 1986)  
               16 IBIA 138 (June 6, 1988)  
 1301-1341 ---- 14 IBIA 71 (Feb. 26, 1986)  
               17 IBIA 72 (Feb. 15, 1989)  
 1302 ----- 14 IBIA 181 (July 24, 1986)  
               16 IBIA 30 (Jan. 14, 1988)  
 1302(6) ----- 16 IBIA 136 (May 18, 1988)  
 1302(8) ----- 13 IBIA 276 (Oct. 10, 1985)  
               14 IBIA 46, 93 I.D. 79 (1986)  
               15 IBIA 13 (Oct. 16, 1986)  
               16 IBIA 9 (Nov. 19, 1987)  
               16 IBIA 138 (June 6, 1988)  
               17 IBIA 169 (July 6, 1989)  
 1321 ----- 13 IBIA 264 (Sept. 26, 1985)  
 1321-1326 ---- 13 IBIA 264 (Sept. 26, 1985)  
 1321(a) ----- 13 IBIA 264 (Sept. 26, 1985)  
 1322 et seq. - 17 IBIA 39 (Jan. 23, 1989)  
 1322(a) ----- 13 IBIA 264 (Sept. 26, 1985)  
 1322(b) ----- 17 IBIA 72 (Feb. 15, 1989)  
 1324 ----- 13 IBIA 264 (Sept. 26, 1985)  
 1326 ----- 17 IBIA 39 (Jan. 23, 1989)  
 1331 ----- 17 IBIA 56 (Jan. 30, 1989)  
 1401-1407 ---- 15 IBIA 277 (Sept. 25, 1987)  
               17 IBIA 97 (Mar. 28, 1989)  
               17 IBIA 97 (Mar. 28, 1989)  
 1402(a) ----- 17 IBIA 97 (Mar. 28, 1989)  
 1403(b) ----- 17 IBIA 97 (Mar. 28, 1989)  
 1403(b)(5) --- 17 IBIA 97 (Mar. 28, 1989)  
 1405(a) ----- 17 IBIA 97 (Mar. 28, 1989)  
 1452(b) ----- 16 IBIA 125 (May 12, 1988)  
 1461 ----- 17 IBIA 152 (June 21, 1989)  
 1461-1469 ---- 17 IBIA 152 (June 21, 1989)  
 1463 ----- 17 IBIA 152 (June 21, 1989)  
 1521-1524 ---- 17 IBIA 158 (June 29, 1989)  
 1522(b) ----- 17 IBIA 158 (June 29, 1989)  
 1701-1716 ---- 18 IBIA 67 (Dec. 5, 1989)  
 1702(a) ----- 18 IBIA 67 (Dec. 5, 1989)  
 1706 ----- 18 IBIA 67 (Dec. 5, 1989)  
 1707(c) ----- 18 IBIA 67 (Dec. 5, 1989)  
 1715(a) ----- 18 IBIA 67 (Dec. 5, 1989)  
 1901-1952 ---- 18 IBIA 63 (Nov. 16, 1989)  
 1901(3) ----- 14 IBIA 87 (Apr. 4, 1986)  
 1911 ----- 18 IBIA 80 (Dec. 19, 1989)  
 1918 ----- 17 IBIA 169 (July 6, 1989)  
 1931 ----- 17 IBIA 177 (July 11, 1989)

## TITLE 25: (Cont.)

sec. 1931-1934 ----- 14 IBIA 87 (Apr. 4, 1986)  
 14 IBIA 259 (Sept. 9, 1986)  
 14 IBIA 270 (Sept. 30, 1986)  
 15 IBIA 1 (Oct. 7, 1986)  
 15 IBIA 71 (Dec. 2, 1986)  
 17 IBIA 177 (July 11, 1989)  
 1932 ----- 17 IBIA 177 (July 11, 1989)  
 2011(d)(2) --- 14 IBIA 45 (Feb. 19, 1986)  
 2102 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 2203 ----- 15 IBIA 220, 94 I.D. 353 (1987)  
 2206 ----- 15 IBIA 55 (Nov. 24, 1986)  
 15 IBIA 198 (May 26, 1987)  
 16 IBIA 45 (Mar. 17, 1988)  
 16 IBIA 153 (June 21, 1988)  
 16 IBIA 167 (July 7, 1988)  
 16 IBIA 210 (Sept. 1, 1988)  
 17 IBIA 95 (Mar. 27, 1989)  
 17 IBIA 115 (Apr. 3, 1989)  
 2206(a) ----- 13 IBIA 241 (Aug. 29, 1985)

## TITLE 26:

sec. 48(a)(2)  
 (B)(vi) --- M-36952, 92 I.D. 459 (1985)  
 956(b)(2) --- M-36952, 92 I.D. 459 (1985)  
 4496(c) ----- M-36952, 92 I.D. 459 (1985)  
 4496(d) ----- M-36952, 92 I.D. 459 (1985)  
 6332 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 6621 ----- 101 IBLA 152 (Feb. 9, 1988)  
 107 IBLA 91 (Feb. 1, 1989)  
 M-36956, 95 I.D. 203 (1988)  
 6621(b) ----- 107 IBLA 91 (Feb. 1, 1989)  
 7701(a)(1) --- 88 IBLA 224, 92 I.D. 363 (1985)  
 7701(b) ----- 88 IBLA 224, 92 I.D. 363 (1985)

## TITLE 28:

sec. 46(c) ----- 109 IBLA 274 (June 20, 1989)  
 516 ----- 16 IBIA 201 (Aug. 18, 1988)  
 636(c) ----- 97 IBLA 285, 94 I.D. 181 (1987)  
 1291 ----- 93 IBLA 297 (Sept. 9, 1986)  
 1332 ----- 18 IBIA 7 (Oct. 5, 1989)  
 1360 ----- 13 IBIA 264 (Sept. 26, 1985)  
 16 IBIA 62 (Mar. 21, 1988)  
 1360(a) ----- 16 IBIA 62 (Mar. 21, 1988)  
 1360(b) ----- 16 IBIA 62 (Mar. 21, 1988)  
 1361 ----- 105 IBLA 369 (Nov. 28, 1988)  
 1391 ----- 95 IBLA 16 (Dec. 12, 1986)  
 100 IBLA 139 (Dec. 2, 1987)  
 1491 ----- IBCA-2409, 95 I.D. 257 (1988)  
 1631 ----- 108 IBLA 358 (May 15, 1989)  
 1923 ----- IBCA-2298-F, 96 I.D. 194 (1989)  
 2409 ----- M-36963, 96 I.D. 331 (1989)  
 2409a ----- 110 IBLA 367 (Sept. 14, 1989)  
 M-36963, 96 I.D. 331 (1989)  
 2409a(g) ----- M-36963, 96 I.D. 331 (1989)  
 2412 ----- IBCA-2243-F, 96 I.D. 324 (1989)  
 93 IBLA 211 (Aug. 20, 1986)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 2412(d) ----- 88 IBLA 126 (Aug. 2, 1985)  
 2412(d)(3) --- 93 IBLA 211 (Aug. 20, 1986)  
 2415 ----- 111 IBLA 284 (Oct. 26, 1989)  
 2415(a) ----- 111 IBLA 284 (Oct. 26, 1989)  
 111 IBLA 300 (Oct. 27, 1989)  
 112 IBLA 77 (Nov. 22, 1989)  
 2416(c) ----- 111 IBLA 284 (Oct. 26, 1989)  
 2462 ----- 6 OHA 86 (Nov. 8, 1985)  
 2516(a) ----- IBCA-2069 (Feb. 22, 1988)  
 2680(h) ----- IBCA-2417, 96 I.D. 148 (1989)

## TITLE 29: (Cont.)

sec. 255(a) ----- 16 IBIA 138 (June 6, 1988)  
 402(b) ----- M-36952, 92 I.D. 459 (1985)  
 626(b) ----- 16 IBIA 138 (June 6, 1988)  
 106 IBLA 104, 95 I.D. 265 (1988)  
 630(i) ----- M-36952, 92 I.D. 459 (1985)  
 653(a) ----- M-36952, 92 I.D. 459 (1985)  
 1002(10) ----- M-36952, 92 I.D. 459 (1985)

## TITLE 30:

sec. 21 ----- 87 IBLA 132 (June 7, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 89 IBLA 350 (Nov. 20, 1985)  
 21-54 ----- 88 IBLA 360 (Sept. 27, 1985)  
 105 IBLA 252 (Nov. 4, 1988)  
 22 ----- 85 IBLA 77, 92 I.D. 83 (1985)  
 86 IBLA 170 (Apr. 25, 1985)  
 87 IBLA 216 (June 18, 1985)  
 88 IBLA 316 (Sept. 18, 1985)  
 90 IBLA 106 (Dec. 23, 1985)  
 90 IBLA 255 (Jan. 31, 1986)  
 91 IBLA 124 (Mar. 19, 1986)  
 92 IBLA 20 (May 6, 1986)  
 92 IBLA 109, 93 I.D. 211 (1986)  
 94 IBLA 69 (Sept. 29, 1986)  
 98 IBLA 251 (July 7, 1987)  
 99 IBLA 120 (Sept. 22, 1987)  
 100 IBLA 94, 94 I.D. 429 (1987)  
 103 IBLA 308 (Aug. 4, 1988)  
 104 IBLA 269 (Sept. 13, 1988)  
 105 IBLA 252 (Nov. 4, 1988)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 110 IBLA 144 (Aug. 10, 1989)  
 22-24 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 22-54 ----- 99 IBLA 237 (Oct. 19, 1987)  
 22 et seq. - M-36955, 93 I.D. 369 (1986)  
 23 ----- 87 IBLA 216 (June 18, 1985)  
 89 IBLA 205 (Oct. 25, 1985)  
 92 IBLA 109, 93 I.D. 211 (1986)  
 93 IBLA 1, 93 I.D. 288 (1986)  
 97 IBLA 359 (May 26, 1987)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 M-36955, 93 I.D. 369 (1986)  
 24 ----- 110 IBLA 144 (Aug. 10, 1989)  
 26 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 93 IBLA 68 (July 15, 1986)  
 100 IBLA 94, 94 I.D. 429 (1987)  
 102 IBLA 162 (May 3, 1988)  
 106 IBLA 1 (Nov. 30, 1988)  
 110 IBLA 39, 96 I.D. 315 (1989)  
 111 IBLA 364 (Nov. 3, 1989)  
 M-36955, 93 I.D. 369 (1986)  
 26-28 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 27 ----- 89 IBLA 205 (Oct. 25, 1985)  
 28 ----- 86 IBLA 215 (Apr. 30, 1985)  
 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 291 (May 13, 1985)  
 87 IBLA 52 (May 23, 1985)  
 87 IBLA 102 (May 30, 1985)  
 87 IBLA 338 (June 26, 1985)  
 90 IBLA 313 (Feb. 25, 1986)  
 91 IBLA 378 (Apr. 28, 1986)  
 93 IBLA 1, 93 I.D. 288 (1986)  
 93 IBLA 199 (Aug. 18, 1986)  
 94 IBLA 229 (Nov. 10, 1986)  
 94 IBLA 239 (Nov. 12, 1986)  
 95 IBLA 26 (Dec. 12, 1986)  
 95 IBLA 328 (Jan. 30, 1987)  
 96 IBLA 391 (Apr. 14, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 98 IBLA 75 (June 9, 1987)  
 98 IBLA 164 (June 24, 1987)  
 98 IBLA 241 (July 6, 1987)  
 99 IBLA 33 (Aug. 31, 1987)

## TITLE 29:

sec. 20 et seq. - IBCA-1917 (July 24, 1986)  
 213(f) ----- M-36952, 92 I.D. 459 (1985)



## (B) United States Codes

## TITLE 30: (Cont.)

sec. 28 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 108 IBLA 102 (Mar. 29, 1989)  
 108 IBLA 247 (Apr. 24, 1989)  
 108 IBLA 334 (May 8, 1989)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 110 IBLA 1 (July 5, 1989)  
 112 IBLA 130 (Nov. 30, 1989)  
 28-1 ----- 87 IBLA 338 (June 26, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 88 IBLA 372 (Sept. 27, 1985)  
 88 IBLA 379 (Sept. 27, 1985)  
 89 IBLA 379 (Nov. 22, 1985)  
 94 IBLA 239 (Nov. 12, 1986)  
 95 IBLA 128 (Jan. 6, 1987)  
 108 IBLA 347 (May 12, 1989)  
 28b ----- 87 IBLA 31 (May 22, 1985)  
 91 IBLA 378 (Apr. 28, 1986)  
 102 IBLA 318 (June 1, 1988)  
 108 IBLA 334 (May 8, 1989)  
 111 IBLA 107 (Sept. 28, 1989)  
 29 ----- 90 IBLA 313 (Feb. 25, 1986)  
 94 IBLA 69 (Sept. 29, 1986)  
 94 IBLA 229 (Nov. 10, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 96 IBLA 311 (Apr. 2, 1987)  
 99 IBLA 237 (Oct. 19, 1987)  
 100 IBLA 94, 94 I.D. 429 (1987)  
 101 IBLA 298 (Mar. 16, 1988)  
 101 IBLA 340, 95 I.D. 49 (1988)  
 102 IBLA 363 (June 10, 1988)  
 108 IBLA 102 (Mar. 29, 1989)  
 110 IBLA 144 (Aug. 10, 1989)  
 111 IBLA 148 (Sept. 29, 1989)  
 M-36955, 93 I.D. 369 (1986)  
 29-30 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 30 ----- 86 IBLA 215 (Apr. 30, 1985)  
 88 IBLA 345 (Sept. 24, 1985)  
 100 IBLA 94, 94 I.D. 429 (1987)  
 102 IBLA 263 (June 10, 1988)  
 110 IBLA 144 (Aug. 10, 1989)  
 111 IBLA 148 (Sept. 29, 1989)  
 112 IBLA 228 (Dec. 19, 1989)  
 M-36955, 93 I.D. 369 (1986)  
 33-35 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 33-85 ----- 87 IBLA 247 (June 20, 1985)  
 35 ----- 85 IBLA 23 (Jan. 30, 1985)  
 92 IBLA 109, 93 I.D. 211 (1986)  
 94 IBLA 69 (Sept. 29, 1986)  
 95 IBLA 33 (Dec. 15, 1986)  
 100 IBLA 94, 94 I.D. 429 (1987)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 108 IBLA 102 (Mar. 29, 1989)  
 110 IBLA 144 (Aug. 10, 1989)  
 36 ----- 92 IBLA 109, 93 I.D. 211 (1986)  
 37 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 38 ----- 85 IBLA 23 (Jan. 30, 1985)  
 86 IBLA 215 (Apr. 30, 1985)  
 89 IBLA 209 (Oct. 25, 1985)  
 90 IBLA 249 (Jan. 30, 1986)  
 92 IBLA 87 (May 28, 1986)  
 94 IBLA 121 (Oct. 9, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 95 IBLA 328 (Jan. 30, 1987)  
 99 IBLA 99 (Sept. 21, 1987)  
 99 IBLA 237 (Oct. 19, 1987)  
 100 IBLA 322 (Dec. 31, 1987)  
 104 IBLA 93 (Aug. 31, 1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 110 IBLA 245 (Aug. 31, 1989)  
 39 ----- 112 IBLA 233 (Dec. 20, 1989)  
 39-42 ----- 100 IBLA 94, 94 I.D. 429 (1987)

## TITLE 30: (Cont.)

sec. 42 ----- 93 IBLA 1, 93 I.D. 288 (1986)  
 103 IBLA 384 (Aug. 15, 1988)  
 42(a) ----- 93 IBLA 1, 93 I.D. 288 (1986)  
 103 IBLA 384 (Aug. 15, 1988)  
 42(b) ----- 93 IBLA 289 (Sept. 4, 1986)  
 103 IBLA 384 (Aug. 15, 1988)  
 47 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 49(c) ----- 98 IBLA 123 (June 19, 1987)  
 49e ----- 105 IBLA 238 (Nov. 4, 1988)  
 51 ----- 93 IBLA 1, 93 I.D. 288 (1986)  
 96 IBLA 193 (Mar. 19, 1987)  
 53 ----- M-36955, 93 I.D. 369 (1986)  
 54 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 98 IBLA 325 (July 31, 1987)  
 101 IBLA 110 (Feb. 2, 1988)  
 81 ----- 98 IBLA 325 (July 31, 1987)  
 104 IBLA 357 (Sept. 23, 1988)  
 121 ----- 90 IBLA 293, 93 I.D. 66 (1986)  
 97 IBLA 45, 94 I.D. 139 (1987)  
 121-123 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 87 IBLA 247 (June 20, 1985)  
 88 IBLA 300 (Sept. 13, 1985)  
 122 ----- 88 IBLA 300 (Sept. 13, 1985)  
 98 IBLA 325 (July 31, 1987)  
 123 ----- 90 IBLA 293, 93 I.D. 66 (1986)  
 90 IBLA 310 (Feb. 26, 1986)  
 124 ----- 88 IBLA 300 (Sept. 13, 1985)  
 161 ----- 92 IBLA 109, 93 I.D. 211 (1986)  
 95 IBLA 69 (Dec. 22, 1986)  
 104 IBLA 93 (Aug. 31, 1988)  
 105 IBLA 252 (Nov. 4, 1988)  
 112 IBLA 51 (Nov. 20, 1989)  
 181 ----- 85 IBLA 66 (Feb. 11, 1985)  
 86 IBLA 153 (Apr. 25, 1985)  
 87 IBLA 357 (June 27, 1985)  
 88 IBLA 240 (Sept. 3, 1985)  
 89 IBLA 388 (Nov. 22, 1985)  
 90 IBLA 293, 93 I.D. 66 (1986)  
 90 IBLA 388 (Feb. 28, 1986)  
 92 IBLA 18 (May 6, 1986)  
 92 IBLA 353 (June 30, 1986)  
 94 IBLA 69 (Sept. 29, 1986)  
 95 IBLA 144, 94 I.D. 1 (1987)  
 95 IBLA 239 (Jan. 16, 1987)  
 95 IBLA 311 (Jan. 30, 1987)  
 96 IBLA 280 (Mar. 26, 1987)  
 97 IBLA 241 (May 13, 1987)  
 97 IBLA 397 (May 27, 1987)  
 98 IBLA 20 (May 29, 1987)  
 98 IBLA 325 (July 31, 1987)  
 98 IBLA 363 (July 31, 1987)  
 99 IBLA 245 (Oct. 20, 1987)  
 99 IBLA 355 (Nov. 3, 1987)  
 100 IBLA 37 (Nov. 19, 1987)  
 101 IBLA 256 (Mar. 2, 1988)  
 102 IBLA 1 (Apr. 5, 1988)  
 103 IBLA 341 (Aug. 9, 1988)  
 104 IBLA 104 (Aug. 31, 1988)  
 104 IBLA 284 (Sept. 14, 1988)  
 105 IBLA 392 (Nov. 30, 1988)  
 106 IBLA 394 (Jan. 23, 1989)  
 107 IBLA 56 (Jan. 30, 1989)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 111 IBLA 181 (Oct. 6, 1989)  
 112 IBLA 254 (Dec. 28, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 181-193a ----- 95 IBLA 239 (Jan. 16, 1987)  
 181-263 ----- 97 IBLA 387 (May 27, 1987)  
 103 IBLA 218 (July 26, 1988)  
 181-287 ----- 86 IBLA 135, 92 I.D. 153 (1985)  
 88 IBLA 336 (Sept. 19, 1985)  
 96 IBLA 1 (Feb. 25, 1987)  
 101 IBLA 158 (Feb. 10, 1988)

## TITLE 30: (Cont.)

sec. 181-287 ----- 106 IBLA 104, 95 I.D. 265 (1988)  
 109 IBLA 220 (June 15, 1989)  
 109 IBLA 274 (June 20, 1989)  
 109 IBLA 398 (June 27, 1989)  
 111 IBLA 381 (Nov. 8, 1989)  
 181 et seq. - 91 IBLA 278, 93 I.D. 179 (1986)  
 95 IBLA 69 (Dec. 2, 1986)  
 97 IBLA 387 (May 27, 1987)  
 98 IBLA 218, 94 I.D. 329 (1987)  
 98 IBLA 325 (July 31, 1987)  
 104 IBLA 104 (Aug. 31, 1988)  
 M-36950, 92 I.D. 512 (1985)  
 183 ----- 93 IBLA 283 (Aug. 29, 1986)  
 184 ----- 89 IBLA 388 (Nov. 22, 1985)  
 99 IBLA 179 (Oct. 9, 1987)  
 M-36951, 92 I.D. 537 (1985)  
 184(a)(1) --- M-36951, 92 I.D. 537 (1985)  
 184(e)(2) --- 107 IBLA 56 (Jan. 30, 1989)  
 184(g) ----- 92 IBLA 235, 93 I.D. 258 (1986)  
 184(h) ----- 85 IBLA 287 (Mar. 13, 1985)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 184(h)(1) --- 92 IBLA 235, 93 I.D. 258 (1986)  
 98 IBLA 363 (July 31, 1987)  
 184(h)(2) --- 85 IBLA 287 (Mar. 13, 1985)  
 92 IBLA 235, 93 I.D. 258 (1986)  
 93 IBLA 351 (Sept. 15, 1986)  
 97 IBLA 96 (Apr. 29, 1987)  
 99 IBLA 278 (Oct. 21, 1987)  
 101 IBLA 315 (Mar. 17, 1988)  
 101 IBLA 320 (Mar. 17, 1988)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 108 IBLA 43 (Mar. 21, 1989)  
 109 IBLA 96 (June 5, 1989)  
 110 IBLA 377 (Sept. 9, 1989)  
 184(i) ----- 103 IBLA 192, 95 I.D. 102 (1988)  
 110 IBLA 377 (Sept. 19, 1989)  
 185 ----- 86 IBLA 258 (May 8, 1985)  
 88 IBLA 240 (Sept. 3, 1985)  
 88 IBLA 248 (Sept. 4, 1985)  
 93 IBLA 293 (Sept. 4, 1986)  
 97 IBLA 45, 94 I.D. 139 (1987)  
 97 IBLA 327 (May 21, 1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 110 IBLA 80 (July 26, 1989)  
 110 IBLA 171 (Aug. 14, 1989)  
 185(a) ----- 95 IBLA 311 (Jan. 30, 1987)  
 97 IBLA 45, 94 I.D. 139 (1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 185(b) ----- 99 IBLA 201 (Oct. 13, 1987)  
 185(c)(1) --- 109 IBLA 160 (June 8, 1989)  
 185(c)(2) --- 109 IBLA 160 (June 8, 1989)  
 185(l) ----- 88 IBLA 240 (Sept. 3, 1985)  
 93 IBLA 293 (Sept. 4, 1986)  
 110 IBLA 171 (Aug. 14, 1989)  
 185(o)(3) --- 15 IBLA 220, 94 I.D. 353 (1987)  
 185(r) ----- 86 IBLA 258 (May 8, 1985)  
 185(r)(1) --- 97 IBLA 45, 94 I.D. 139 (1987)  
 186 ----- 110 IBLA 80 (July 26, 1989)  
 187 ----- 86 IBLA 153 (Apr. 25, 1985)  
 86 IBLA 315 (May 14, 1985)  
 87 IBLA 60 (Apr. 10, 1985)  
 87 IBLA 228 (June 19, 1985)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 352 (Dec. 1, 1986)  
 97 IBLA 241 (May 13, 1987)  
 105 IBLA 126 (Oct. 26, 1988)  
 109 IBLA 106 (June 7, 1989)  
 110 IBLA 179 (Aug. 15, 1989)  
 M-36778 (Supp.), 92 I.D. 121 (1985)  
 M-36951, 92 I.D. 537 (1985)  
 187a ----- 85 IBLA 116 (Feb. 15, 1985)  
 86 IBLA 345 (May 16, 1985)

## TITLE 30: (Cont.)

sec. 187a ----- 87 IBLA 319 (June 25, 1985)  
 88 IBLA 240 (Sept. 3, 1985)  
 90 IBLA 280 (Feb. 10, 1986)  
 91 IBLA 165 (Mar. 26, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 93 IBLA 143 (July 30, 1986)  
 94 IBLA 84 (Sept. 30, 1986)  
 94 IBLA 197 (Oct. 30, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 96 IBLA 398 (Apr. 14, 1987)  
 98 IBLA 20 (May 29, 1987)  
 99 IBLA 164 (Oct. 2, 1987)  
 100 IBLA 37 (Nov. 19, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 107 IBLA 10 (Jan. 24, 1989)  
 108 IBLA 267 (Apr. 25, 1989)  
 109 IBLA 322 (June 21, 1989)  
 111 IBLA 280 (Oct. 26, 1989)  
 M-36778 (Supp.), 92 I.D. 121 (1985)  
 M-36953, 92 I.D. 293 (1985)  
 187b ----- 86 IBLA 315 (May 14, 1985)  
 90 IBLA 63, 92 I.D. 617 (1985)  
 96 IBLA 249 (Mar. 25, 1987)  
 110 IBLA 377 (Sept. 19, 1989)  
 188 ----- 86 IBLA 315 (May 14, 1985)  
 88 IBLA 221 (Aug. 28, 1985)  
 91 IBLA 327 (Apr. 17, 1986)  
 93 IBLA 97 (July 22, 1986)  
 94 IBLA 259 (Nov. 14, 1986)  
 98 IBLA 293 (July 20, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 101 IBLA 57 (Jan. 27, 1988)  
 101 IBLA 315 (Mar. 17, 1988)  
 102 IBLA 396 (June 21, 1988)  
 103 IBLA 312 (Aug. 5, 1988)  
 108 IBLA 43 (Mar. 21, 1989)  
 108 IBLA 47 (Mar. 21, 1989)  
 109 IBLA 96 (June 5, 1989)  
 110 IBLA 377 (Sept. 19, 1989)  
 188(a) ----- 85 IBLA 287 (Mar. 13, 1985)  
 86 IBLA 242 (Apr. 30, 1985)  
 93 IBLA 283 (Aug. 29, 1986)  
 98 IBLA 363 (July 31, 1987)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 109 IBLA 394 (June 26, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 188(b) ----- 85 IBLA 116 (Feb. 15, 1985)  
 85 IBLA 151 (Feb. 25, 1985)  
 85 IBLA 287 (Mar. 13, 1985)  
 85 IBLA 385 (Mar. 27, 1985)  
 86 IBLA 32 (Apr. 3, 1985)  
 86 IBLA 72 (Apr. 10, 1985)  
 86 IBLA 322 (May 16, 1985)  
 86 IBLA 345 (May 16, 1985)  
 87 IBLA 27 (May 22, 1985)  
 87 IBLA 71 (May 28, 1985)  
 87 IBLA 316 (June 25, 1985)  
 87 IBLA 319 (June 25, 1985)  
 88 IBLA 221 (Aug. 28, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 89 IBLA 175 (Oct. 11, 1985)  
 90 IBLA 63, 92 I.D. 617 (1985)  
 90 IBLA 95 (Dec. 23, 1985)  
 90 IBLA 182 (Jan. 23, 1986)  
 90 IBLA 280 (Feb. 10, 1986)  
 90 IBLA 349 (Feb. 26, 1986)  
 90 IBLA 357 (Feb. 27, 1986)  
 91 IBLA 165 (Mar. 26, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 91 IBLA 239 (Apr. 8, 1986)  
 91 IBLA 327 (Apr. 17, 1986)  
 91 IBLA 394 (Apr. 29, 1986)  
 92 IBLA 98 (May 28, 1986)



## TITLE 30: (Cont.)

sec. 187(b) ----- 92 IBLA 101 (May 30, 1986)  
 92 IBLA 308 (June 26, 1986)  
 92 IBLA 330 (June 30, 1986)  
 92 IBLA 378 (July 8, 1986)  
 93 IBLA 80 (July 16, 1986)  
 93 IBLA 97 (July 22, 1986)  
 94 IBLA 30 (Sept. 25, 1986)  
 94 IBLA 148 (Oct. 21, 1986)  
 94 IBLA 150 (Oct. 23, 1986)  
 94 IBLA 197 (Oct. 30, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 259 (Nov. 14, 1986)  
 94 IBLA 344 (Nov. 26, 1986)  
 96 IBLA 352 (Apr. 8, 1987)  
 96 IBLA 398 (Apr. 14, 1987)  
 98 IBLA 293 (July 20, 1987)  
 98 IBLA 363 (July 31, 1987)  
 99 IBLA 1 (Aug. 11, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 57 (Jan. 27, 1988)  
 101 IBLA 66 (Jan. 27, 1988)  
 102 IBLA 49 (Apr. 13, 1988)  
 102 IBLA 329 (June 3, 1988)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 103 IBLA 352 (Aug. 10, 1988)  
 107 IBLA 10 (Jan. 24, 1989)  
 107 IBLA 335 (Mar. 15, 1989)  
 108 IBLA 47 (Mar. 21, 1989)  
 108 IBLA 366 (May 16, 1989)  
 109 IBLA 72 (May 30, 1989)  
 109 IBLA 79 (May 31, 1989)  
 109 IBLA 82 (May 31, 1989)  
 109 IBLA 270 (June 16, 1989)  
 109 IBLA 394 (June 26, 1989)  
 110 IBLA 377 (Sept. 19, 1989)  
 111 IBLA 280 (Oct. 26, 1989)  
 112 IBLA 134 (Dec. 4, 1989)  
 188(c) ----- 85 IBLA 116 (Feb. 15, 1985)  
 85 IBLA 151 (Feb. 25, 1985)  
 85 IBLA 385 (Mar. 27, 1985)  
 86 IBLA 32 (Apr. 3, 1985)  
 86 IBLA 72 (Apr. 10, 1985)  
 86 IBLA 315 (May 14, 1985)  
 86 IBLA 345 (May 16, 1985)  
 87 IBLA 27 (May 22, 1985)  
 87 IBLA 71 (May 28, 1985)  
 87 IBLA 316 (June 25, 1985)  
 87 IBLA 319 (June 25, 1985)  
 88 IBLA 221 (Aug. 28, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 89 IBLA 175 (Oct. 11, 1985)  
 90 IBLA 63, 92 I.D. 617 (1985)  
 90 IBLA 95 (Dec. 23, 1985)  
 90 IBLA 182 (Jan. 23, 1986)  
 90 IBLA 280 (Feb. 10, 1986)  
 90 IBLA 349 (Feb. 26, 1986)  
 90 IBLA 357 (Feb. 27, 1986)  
 91 IBLA 165 (Mar. 26, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 91 IBLA 239 (Apr. 8, 1986)  
 91 IBLA 327 (Apr. 17, 1986)  
 91 IBLA 394 (Apr. 29, 1986)  
 92 IBLA 101 (May 30, 1986)  
 92 IBLA 308 (June 26, 1986)  
 92 IBLA 330 (June 30, 1986)  
 92 IBLA 378 (July 8, 1986)  
 93 IBLA 80 (July 16, 1986)  
 93 IBLA 97 (July 22, 1986)  
 94 IBLA 30 (Sept. 25, 1986)  
 94 IBLA 148 (Oct. 21, 1986)  
 94 IBLA 150 (Oct. 23, 1986)

## TITLE 30: (Cont.)

sec. 187(c) ----- 94 IBLA 197 (Oct. 30, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 344 (Nov. 26, 1986)  
 96 IBLA 398 (Apr. 14, 1987)  
 98 IBLA 293 (July 20, 1987)  
 99 IBLA 1 (Aug. 11, 1987)  
 101 IBLA 57 (Jan. 27, 1988)  
 101 IBLA 66 (Jan. 27, 1988)  
 101 IBLA 152 (Feb. 9, 1988)  
 102 IBLA 329 (June 3, 1988)  
 103 IBLA 352 (Aug. 10, 1988)  
 107 IBLA 253 (Feb. 22, 1989)  
 107 IBLA 257 (Feb. 22, 1989)  
 107 IBLA 261 (Feb. 22, 1989)  
 107 IBLA 335 (Mar. 15, 1989)  
 108 IBLA 47 (Mar. 21, 1989)  
 108 IBLA 59 (Mar. 22, 1989)  
 108 IBLA 72 (May 30, 1989)  
 109 IBLA 79 (May 31, 1989)  
 109 IBLA 82 (May 31, 1989)  
 109 IBLA 220 (June 15, 1989)  
 109 IBLA 270 (June 16, 1989)  
 109 IBLA 322 (June 21, 1989)  
 112 IBLA 134 (Dec. 4, 1989)  
 188(c)-(e) -- 101 IBLA 57 (Jan. 27, 1988)  
 188(d) ----- 85 IBLA 116 (Feb. 15, 1985)  
 85 IBLA 151 (Feb. 25, 1985)  
 85 IBLA 385 (Mar. 27, 1985)  
 86 IBLA 32 (Apr. 3, 1985)  
 86 IBLA 72 (Apr. 10, 1985)  
 86 IBLA 315 (May 14, 1985)  
 86 IBLA 345 (May 16, 1985)  
 87 IBLA 27 (May 22, 1985)  
 87 IBLA 71 (May 28, 1985)  
 87 IBLA 316 (June 25, 1985)  
 88 IBLA 221 (Aug. 28, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 90 IBLA 63, 92 I.D. 617 (1985)  
 90 IBLA 95 (Dec. 23, 1985)  
 90 IBLA 182 (Jan. 23, 1986)  
 90 IBLA 280 (Feb. 10, 1986)  
 90 IBLA 349 (Feb. 26, 1986)  
 90 IBLA 357 (Feb. 27, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 91 IBLA 239 (Apr. 8, 1986)  
 91 IBLA 327 (Apr. 17, 1986)  
 91 IBLA 394 (Apr. 29, 1986)  
 92 IBLA 308 (June 26, 1986)  
 92 IBLA 330 (June 30, 1986)  
 92 IBLA 378 (July 8, 1986)  
 93 IBLA 80 (July 16, 1986)  
 93 IBLA 97 (July 22, 1986)  
 94 IBLA 150 (Oct. 23, 1986)  
 94 IBLA 197 (Oct. 30, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 344 (Nov. 26, 1986)  
 96 IBLA 398 (Apr. 14, 1987)  
 98 IBLA 293 (July 20, 1987)  
 99 IBLA 1 (Aug. 11, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 101 IBLA 57 (Jan. 27, 1988)  
 101 IBLA 66 (Jan. 27, 1988)  
 102 IBLA 49 (Apr. 13, 1988)  
 102 IBLA 329 (June 3, 1988)  
 103 IBLA 352 (Aug. 10, 1988)  
 107 IBLA 253 (Feb. 22, 1989)  
 107 IBLA 257 (Feb. 22, 1989)  
 107 IBLA 261 (Feb. 22, 1989)  
 107 IBLA 335 (Mar. 15, 1989)  
 108 IBLA 366 (May 16, 1989)  
 108 IBLA 47 (Mar. 21, 1989)  
 108 IBLA 59 (Mar. 22, 1989)

## (B) United States Codes

## TITLE 30: (Cont.)

sec. 188(d) ----- 109 IBLA 72 (May 30, 1989)  
 109 IBLA 79 (May 31, 1989)  
 109 IBLA 82 (May 31, 1989)  
 109 IBLA 220 (June 15, 1989)  
 109 IBLA 270 (June 16, 1989)  
 109 IBLA 322 (June 21, 1989)  
 112 IBLA 134 (Dec. 4, 1989)  
 188(d)-(e) -- 101 IBLA 57 (Jan. 27, 1988)  
 108 IBLA 241 (Apr. 24, 1989)  
 188(d)(1) --- 101 IBLA 57 (Jan. 27, 1988)  
 102 IBLA 46 (Apr. 13, 1988)  
 109 IBLA 220 (June 15, 1989)  
 188(d)(2)(B)- 85 IBLA 116 (Feb. 15, 1985)  
 87 IBLA 27 (May 22, 1985)  
 90 IBLA 349 (Feb. 26, 1986)  
 91 IBLA 395 (Apr. 30, 1986)  
 92 IBLA 330 (June 30, 1986)  
 101 IBLA 57 (Jan. 27, 1988)  
 188(d)(2)  
 (B)(i) ----- 86 IBLA 315 (May 14, 1985)  
 102 IBLA 49 (Apr. 13, 1988)  
 108 IBLA 47 (Mar. 21, 1989)  
 188(e) ----- 85 IBLA 116 (Feb. 15, 1985)  
 85 IBLA 151 (Feb. 25, 1985)  
 85 IBLA 385 (Mar. 27, 1985)  
 86 IBLA 32 (Apr. 3, 1985)  
 86 IBLA 72 (Apr. 10, 1985)  
 86 IBLA 345 (May 16, 1985)  
 87 IBLA 71 (May 28, 1985)  
 87 IBLA 316 (June 25, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 90 IBLA 63, 92 I.D. 617 (1985)  
 90 IBLA 95 (Dec. 23, 1985)  
 90 IBLA 182 (Jan. 23, 1986)  
 90 IBLA 349 (Feb. 26, 1986)  
 90 IBLA 357 (Feb. 27, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 91 IBLA 394 (Apr. 29, 1986)  
 92 IBLA 330 (June 30, 1986)  
 94 IBLA 197 (Oct. 30, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 344 (Nov. 26, 1986)  
 99 IBLA 1 (Aug. 11, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 101 IBLA 57 (Jan. 27, 1988)  
 101 IBLA 66 (Jan. 27, 1988)  
 102 IBLA 329 (June 3, 1988)  
 108 IBLA 47 (Mar. 21, 1989)  
 108 IBLA 366 (May 16, 1989)  
 109 IBLA 270 (June 16, 1989)  
 109 IBLA 322 (June 21, 1989)  
 188(e)(2) --- 85 IBLA 385 (Mar. 27, 1985)  
 87 IBLA 27 (May 22, 1985)  
 90 IBLA 349 (Feb. 26, 1986)  
 92 IBLA 330 (June 20, 1986)  
 188(e)(3) --- 85 IBLA 385 (Mar. 27, 1985)  
 188(i)(2) --- 100 IBLA 313 (Dec. 28, 1987)  
 108 IBLA 241 (Apr. 24, 1989)  
 189 ----- 86 IBLA 153 (Apr. 25, 1985)  
 92 IBLA 235, 93 I.D. 258 (1986)  
 93 IBLA 283 (Aug. 29, 1986)  
 100 IBLA 139 (Dec. 2, 1987)  
 104 IBLA 28 (Aug. 22, 1988)  
 106 IBLA 155 (Dec. 19, 1988)  
 109 IBLA 106 (June 7, 1989)  
 110 IBLA 179 (Aug. 15, 1989)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 M-36778 (Supp.), 92 I.D. 121 (1985)  
 M-36951, 92 I.D. 537 (1985)  
 M-36953, 92 I.D. 293 (1985)  
 190 ----- M-36778 (Supp.), 92 I.D. 121 (1985)

## TITLE 30: (Cont.)

sec. 191 ----- 92 IBLA 365, 93 I.D. 285 (1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 94 IBLA 78 (Sept. 30, 1986)  
 94 IBLA 215 (Nov. 5, 1986)  
 101 IBLA 152 (Feb. 9, 1988)  
 102 IBLA 396 (June 21, 1988)  
 103 IBLA 138 (July 20, 1988)  
 106 IBLA 104, 95 I.D. 265 (1988)  
 106 IBLA 300 (Jan. 5, 1989)  
 108 IBLA 62 (Mar. 22, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36956, 95 I.D. 203 (1988)  
 192(c) ----- 91 IBLA 55 (Feb. 28, 1986)  
 201 ----- 86 IBLA 21 (Mar. 29, 1985)  
 86 IBLA 153 (Apr. 25, 1985)  
 86 IBLA 242 (Apr. 30, 1985)  
 87 IBLA 109 (May 31, 1985)  
 91 IBLA 278, 93 I.D. 179 (1986)  
 93 IBLA 272 (Aug. 29, 1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 98 IBLA 325 (July 31, 1987)  
 99 IBLA 179 (Oct. 9, 1987)  
 103 IBLA 312 (Aug. 5, 1988)  
 103 IBLA 366 (Aug. 12, 1988)  
 105 IBLA 64 (Oct. 18, 1988)  
 105 IBLA 126 (Oct. 26, 1988)  
 106 IBLA 339 (Jan. 12, 1989)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 86 IBLA 21 (Mar. 29, 1985)  
 86 IBLA 60 (Apr. 10, 1985)  
 87 IBLA 296 (June 25, 1985)  
 91 IBLA 93 (Mar. 13, 1986)  
 92 IBLA 184, 93 I.D. 239 (1986)  
 93 IBLA 179 (Aug. 15, 1986)  
 93 IBLA 272 (Aug. 29, 1986)  
 94 IBLA 352 (Dec. 1, 1986)  
 95 IBLA 239 (Jan. 16, 1987)  
 96 IBLA 280 (Mar. 26, 1987)  
 97 IBLA 241 (May 13, 1987)  
 98 IBLA 198 (June 29, 1987)  
 99 IBLA 342 (Nov. 3, 1987)  
 102 IBLA 308 (May 31, 1988)  
 104 IBLA 284 (Sept. 14, 1988)  
 106 IBLA 339 (Jan. 12, 1989)  
 110 IBLA 179 (Aug. 15, 1989)  
 112 IBLA 103 (Nov. 29, 1989)  
 201(a)(1) --- 93 IBLA 317, 93 I.D. 394 (1986)  
 96 IBLA 126 (Mar. 11, 1987)  
 201(a)(2)(A)- 96 IBLA 126 (Mar. 11, 1987)  
 107 IBLA 311, 96 I.D. 77 (1989)  
 109 IBLA 106 (June 7, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 201(b) ----- 102 IBLA 308 (May 31, 1988)  
 112 IBLA 115 (Nov. 30, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36951, 92 I.D. 537 (1985)  
 202a ----- M-36951, 92 I.D. 537 (1985)  
 202a(1) ----- 109 IBLA 254 (June 16, 1989)  
 202a(2) ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 202a(3)(i) -- M-36951, 92 I.D. 537 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 202a(4) ----- 109 IBLA 254 (June 16, 1989)  
 203 ----- 86 IBLA 21 (Mar. 29, 1985)  
 87 IBLA 109 (May 31, 1985)  
 108 IBLA 130 (Apr. 3, 1989)  
 109 IBLA 254 (June 16, 1989)  
 112 IBLA 103 (Nov. 29, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 207 ----- 86 IBLA 21 (Mar. 29, 1985)  
 86 IBLA 60 (Apr. 10, 1985)  
 86 IBLA 153 (Apr. 25, 1985)

## (B) United States Codes

## TITLE 30: (Cont.)

sec. 207 ----- 87 IBLA 228 (June 19, 1985)  
 87 IBLA 296 (June 25, 1985)  
 89 IBLA 1, 92 I.D. 389 (1985)  
 90 IBLA 43 (Dec. 10, 1985)  
 91 IBLA 93 (Mar. 13, 1986)  
 92 IBLA 184, 93 I.D. 239 (1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 94 IBLA 333 (Nov. 25, 1986)  
 94 IBLA 352 (Dec. 1, 1986)  
 95 IBLA 16 (Dec. 12, 1986)  
 96 IBLA 280 (Mar. 26, 1987)  
 97 IBLA 241 (May 13, 1987)  
 98 IBLA 114 (June 16, 1987)  
 99 IBLA 179 (Oct. 9, 1987)  
 99 IBLA 342 (Nov. 3, 1987)  
 103 IBLA 312 (Aug. 5, 1988)  
 103 IBLA 366 (Aug. 12, 1988)  
 106 IBLA 339 (Jan. 12, 1989)  
 108 IBLA 96 (Mar. 29, 1989)  
 110 IBLA 179 (Aug. 15, 1989)  
 111 IBLA 160 (Oct. 4, 1989)  
 111 IBLA 381 (Nov. 8, 1989)  
 112 IBLA 103 (Nov. 29, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 207(a) ----- 86 IBLA 21 (Mar. 29, 1985)  
 86 IBLA 60 (Apr. 10, 1985)  
 86 IBLA 153 (Apr. 25, 1985)  
 87 IBLA 228 (June 19, 1985)  
 90 IBLA 43 (Dec. 10, 1985)  
 91 IBLA 93 (Mar. 13, 1986)  
 92 IBLA 184, 93 I.D. 239 (1986)  
 93 IBLA 179 (Aug. 15, 1986)  
 93 IBLA 272 (Aug. 29, 1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 94 IBLA 333 (Nov. 25, 1986)  
 94 IBLA 352 (Dec. 1, 1986)  
 96 IBLA 140 (Mar. 11, 1987)  
 96 IBLA 280 (Mar. 26, 1987)  
 97 IBLA 241 (May 13, 1987)  
 98 IBLA 114 (June 16, 1987)  
 98 IBLA 198 (June 29, 1987)  
 99 IBLA 342 (Nov. 3, 1987)  
 103 IBLA 218 (July 26, 1988)  
 103 IBLA 366 (Aug. 12, 1988)  
 104 IBLA 284 (Sept. 14, 1988)  
 106 IBLA 339 (Jan. 12, 1989)  
 107 IBLA 311, 96 I.D. 77 (1989)  
 108 IBLA 96 (Mar. 29, 1989)  
 111 IBLA 160 (Oct. 4, 1989)  
 112 IBLA 103 (Nov. 29, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 207(b) ----- 86 IBLA 153 (Apr. 25, 1985)  
 92 IBLA 184, 93 I.D. 239 (1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 98 IBLA 198 (June 29, 1987)  
 103 IBLA 218 (July 26, 1988)  
 107 IBLA 311, 96 I.D. 77 (1989)  
 109 IBLA 106 (June 7, 1989)  
 110 IBLA 179 (Aug. 15, 1989)  
 111 IBLA 160 (Oct. 4, 1989)  
 112 IBLA 103 (Nov. 30, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 207(c) ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 M-36958, 96 I.D. 15 (1989)  
 208 ----- 90 IBLA 338 (Feb. 26, 1986)  
 112 IBLA 193 (Dec. 13, 1989)  
 209 ----- 86 IBLA 21 (Mar. 29, 1985)

## TITLE 30: (Cont.)

sec. 207 ----- 86 IBLA 60 (Apr. 10, 1985)  
 86 IBLA 153 (Apr. 25, 1985)  
 88 IBLA 330 (Sept. 19, 1985)  
 90 IBLA 43 (Dec. 10, 1985)  
 91 IBLA 93 (Mar. 13, 1986)  
 92 IBLA 46 (May 9, 1986)  
 92 IBLA 184, 93 I.D. 239 (1986)  
 92 IBLA 333 (June 30, 1986)  
 93 IBLA 179 (Aug. 15, 1986)  
 93 IBLA 272 (Aug. 29, 1986)  
 93 IBLA 317, 93 I.D. 394 (1986)  
 94 IBLA 115 (Oct. 9, 1986)  
 94 IBLA 333 (Nov. 25, 1986)  
 95 IBLA 16 (Dec. 12, 1986)  
 96 IBLA 140 (Mar. 11, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 100 IBLA 352 (Jan. 12, 1988)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 102 IBLA 352 (June 9, 1988)  
 104 IBLA 133 (Sept. 2, 1988)  
 105 IBLA 84 (Oct. 19, 1988)  
 105 IBLA 126 (Oct. 26, 1988)  
 106 IBLA 339 (Jan. 12, 1989)  
 108 IBLA 288 (Apr. 27, 1989)  
 111 IBLA 107 (Sept. 28, 1989)  
 111 IBLA 326 (Oct. 31, 1989)  
 111 IBLA 381 (Nov. 8, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36953, 92 I.D. 293 (1985)  
 M-36958, 96 I.D. 15 (1989)  
 211 ----- 102 IBLA 308 (May 31, 1988)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 211(a) ----- 102 IBLA 308 (May 31, 1988)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 211(b) ----- 102 IBLA 308 (May 31, 1988)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 223-236b --- 95 IBLA 239 (Jan. 16, 1987)  
 226 ----- 85 IBLA 36 (Jan. 31, 1985)  
 85 IBLA 151 (Feb. 25, 1985)  
 85 IBLA 379 (Mar. 26, 1985)  
 86 IBLA 135, 92 I.D. 153 (1985)  
 87 IBLA 1 (May 17, 1985)  
 87 IBLA 27 (May 22, 1985)  
 87 IBLA 79 (May 28, 1985)  
 87 IBLA 357 (June 27, 1985)  
 89 IBLA 366 (Nov. 20, 1985)  
 89 IBLA 388 (Nov. 22, 1985)  
 90 IBLA 12 (Dec. 3, 1985)  
 90 IBLA 349 (Feb. 26, 1986)  
 90 IBLA 357 (Feb. 27, 1986)  
 91 IBLA 187 (Mar. 31, 1986)  
 92 IBLA 12 (May 6, 1986)  
 92 IBLA 98 (May 28, 1986)  
 92 IBLA 235, 93 I.D. 258 (1986)  
 92 IBLA 330 (June 30, 1986)  
 92 IBLA 353 (June 30, 1986)  
 93 IBLA 61 (July 15, 1986)  
 93 IBLA 101 (July 22, 1986)  
 93 IBLA 143 (July 30, 1986)  
 94 IBLA 64 (Sept. 29, 1986)  
 94 IBLA 212 (Nov. 5, 1986)  
 94 IBLA 254 (Nov. 13, 1986)  
 94 IBLA 344 (Nov. 26, 1986)  
 95 IBLA 98 (Dec. 31, 1986)  
 95 IBLA 267 (Jan. 27, 1987)  
 96 IBLA 61 (Feb. 27, 1987)  
 96 IBLA 87 (Mar. 9, 1987)  
 96 IBLA 178 (Mar. 18, 1987)  
 97 IBLA 96 (Apr. 29, 1987)  
 97 IBLA 171 (May 7, 1987)  
 98 IBLA 363 (July 31, 1987)  
 99 IBLA 5 (Aug. 11, 1987)

## TITLE 30: (Cont.)

sec. 226 ----- 99 IBLA 40 (Sept. 8, 1987)  
 99 IBLA 128 (Sept. 22, 1987)  
 100 IBLA 37 (Nov. 19, 1987)  
 102 IBLA 210 (May 10, 1988)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 103 IBLA 260 (July 27, 1988)  
 104 IBLA 28 (Aug. 22, 1988)  
 104 IBLA 34 (Aug. 22, 1988)  
 104 IBLA 42 (Aug. 22, 1988)  
 104 IBLA 51 (Aug. 24, 1988)  
 104 IBLA 117 (Sept. 1, 1988)  
 104 IBLA 133 (Sept. 2, 1988)  
 105 IBLA 61 (Oct. 17, 1988)  
 106 IBLA 9 (Nov. 30, 1988)  
 106 IBLA 15 (Nov. 30, 1988)  
 106 IBLA 57 (Dec. 12, 1988)  
 106 IBLA 72 (Dec. 12, 1988)  
 106 IBLA 155 (Dec. 19, 1988)  
 106 IBLA 367 (Jan. 13, 1989)  
 107 IBLA 10 (Jan. 24, 1989)  
 107 IBLA 78 (Jan. 31, 1989)  
 107 IBLA 165 (Feb. 13, 1989)  
 107 IBLA 253 (Feb. 22, 1989)  
 107 IBLA 257 (Feb. 22, 1989)  
 107 IBLA 261 (Feb. 22, 1989)  
 108 IBLA 250 (Apr. 25, 1989)  
 109 IBLA 23 (May 25, 1989)  
 109 IBLA 317 (June 21, 1989)  
 109 IBLA 383 (June 26, 1989)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 111 IBLA 326 (Oct. 31, 1989)  
 112 IBLA 5 (Nov. 8, 1989)  
 112 IBLA 69 (Nov. 22, 1989)  
 112 IBLA 243 (Dec. 28, 1989)  
 M-36958, 96 I.D. 15 (1989)  
 226(a) ----- 89 IBLA 154 (Oct. 4, 1985)  
 95 IBLA 239 (Jan. 16, 1987)  
 226(b) ----- 85 IBLA 29 (Jan. 30, 1985)  
 85 IBLA 69 (Feb. 11, 1985)  
 85 IBLA 135 (Feb. 19, 1985)  
 85 IBLA 156 (Feb. 25, 1985)  
 85 IBLA 161 (Feb. 25, 1985)  
 85 IBLA 193 (Feb. 27, 1985)  
 85 IBLA 235 (Mar. 4, 1985)  
 85 IBLA 287 (Mar. 13, 1985)  
 85 IBLA 303 (Mar. 15, 1985)  
 85 IBLA 307 (Mar. 19, 1985)  
 85 IBLA 379 (Mar. 26, 1985)  
 86 IBLA 8 (Mar. 29, 1985)  
 86 IBLA 13 (Mar. 29, 1985)  
 86 IBLA 37 (Apr. 9, 1985)  
 86 IBLA 143 (Apr. 23, 1985)  
 86 IBLA 168 (Apr. 25, 1985)  
 86 IBLA 172 (Apr. 26, 1985)  
 87 IBLA 123 (May 31, 1985)  
 87 IBLA 168 (June 13, 1985)  
 88 IBLA 48 (July 15, 1985)  
 88 IBLA 279 (Sept. 10, 1985)  
 88 IBLA 356 (Sept. 26, 1985)  
 89 IBLA 167 (Oct. 10, 1985)  
 89 IBLA 216 (Oct. 25, 1985)  
 89 IBLA 270 (Nov. 8, 1985)  
 90 IBLA 7 (Nov. 27, 1985)  
 90 IBLA 33 (Dec. 10, 1985)  
 90 IBLA 103 (Dec. 23, 1985)  
 90 IBLA 130 (Dec. 24, 1985)  
 90 IBLA 375 (Feb. 27, 1986)  
 90 IBLA 378 (Feb. 27, 1986)  
 91 IBLA 76 (Mar. 3, 1986)  
 91 IBLA 119 (Mar. 17, 1986)  
 91 IBLA 162 (Mar. 25, 1986)  
 91 IBLA 195 (Mar. 31, 1986)  
 91 IBLA 348 (Apr. 22, 1986)

## TITLE 30: (Cont.)

sec. 226(b) ----- 91 IBLA 352 (Apr. 23, 1986)  
 91 IBLA 384 (Apr. 28, 1986)  
 92 IBLA 67 (May 22, 1986)  
 92 IBLA 235, 93 I.D. 258 (1986)  
 92 IBLA 362 (June 30, 1986)  
 93 IBLA 61 (July 15, 1986)  
 93 IBLA 84 (July 16, 1986)  
 93 IBLA 97 (July 22, 1986)  
 93 IBLA 134 (July 29, 1986)  
 93 IBLA 237 (Aug. 22, 1986)  
 93 IBLA 287 (Sept. 3, 1986)  
 93 IBLA 343 (Sept. 11, 1986)  
 93 IBLA 391 (Sept. 18, 1986)  
 94 IBLA 34 (Sept. 25, 1986)  
 94 IBLA 135 (Oct. 21, 1986)  
 94 IBLA 202 (Nov. 4, 1986)  
 94 IBLA 249 (Nov. 13, 1986)  
 95 IBLA 337 (Jan. 30, 1987)  
 96 IBLA 316 (Apr. 2, 1987)  
 97 IBLA 322 (May 20, 1987)  
 98 IBLA 96 (June 12, 1987)  
 98 IBLA 118 (June 17, 1987)  
 98 IBLA 193 (June 29, 1987)  
 98 IBLA 213 (July 1, 1987)  
 98 IBLA 268 (July 10, 1987)  
 99 IBLA 29 (Aug. 26, 1987)  
 99 IBLA 184 (Oct. 13, 1987)  
 99 IBLA 194 (Oct. 13, 1987)  
 99 IBLA 369 (Nov. 4, 1987)  
 100 IBLA 139 (Dec. 2, 1987)  
 100 IBLA 172 (Dec. 8, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 100 (Feb. 2, 1988)  
 103 IBLA 1 (June 21, 1988)  
 103 IBLA 251 (July 27, 1988)  
 103 IBLA 347 (Aug. 10, 1988)  
 104 IBLA 28 (Aug. 22, 1988)  
 104 IBLA 57 (Aug. 25, 1988)  
 104 IBLA 72 (Aug. 26, 1988)  
 104 IBLA 104 (Aug. 31, 1988)  
 104 IBLA 296 (Sept. 14, 1988)  
 104 IBLA 301 (Sept. 14, 1988)  
 104 IBLA 317 (Sept. 20, 1988)  
 105 IBLA 9 (Oct. 7, 1988)  
 105 IBLA 97 (Oct. 24, 1988)  
 105 IBLA 166 (Oct. 31, 1988)  
 105 IBLA 392 (Nov. 30, 1988)  
 106 IBLA 155 (Dec. 19, 1988)  
 106 IBLA 394 (Jan. 23, 1989)  
 107 IBLA 26 (Jan. 25, 1989)  
 107 IBLA 91 (Feb. 1, 1989)  
 107 IBLA 197 (Feb. 15, 1989)  
 108 IBLA 20, 96 I.D. 127 (1989)  
 110 IBLA 112 (Aug. 4, 1989)  
 110 IBLA 130 (Aug. 9, 1989)  
 110 IBLA 154 (Aug. 11, 1989)  
 110 IBLA 266 (Sept. 12, 1989)  
 112 IBLA 94 (Nov. 28, 1989)  
 226(b)(1) --- 85 IBLA 303 (Mar. 15, 1985)  
 89 IBLA 384 (Nov. 22, 1985)  
 90 IBLA 130 (Dec. 24, 1985)  
 95 IBLA 247 (Jan. 23, 1987)  
 97 IBLA 85 (Apr. 28, 1987)  
 98 IBLA 283 (July 20, 1987)  
 102 IBLA 337 (June 7, 1988)  
 104 IBLA 129 (Sept. 1, 1988)  
 104 IBLA 317 (Sept. 20, 1988)  
 105 IBLA 234 (Nov. 4, 1988)  
 108 IBLA 20, 96 I.D. 127 (1989)  
 111 IBLA 284 (Oct. 26, 1989)  
 112 IBLA 243 (Dec. 28, 1989)  
 226(b)(1)(A)- 112 IBLA 5 (Nov. 8, 1989)



## TITLE 30: (Cont.)

sec. 226(b)(2) --- 108 IBLA 20, 96 I.D. 127 (1989)  
 226(c) ----- 85 IBLA 303 (Mar. 15, 1985)  
 86 IBLA 172 (Apr. 26, 1985)  
 88 IBLA 39 (July 10, 1985)  
 89 IBLA 384 (Nov. 22, 1985)  
 90 IBLA 70 (Dec. 16, 1985)  
 90 IBLA 130 (Dec. 24, 1985)  
 91 IBLA 268 (Apr. 11, 1986)  
 92 IBLA 235, 93 I.D. 258 (1986)  
 93 IBLA 97 (July 22, 1986)  
 93 IBLA 138 (July 30, 1986)  
 93 IBLA 314 (Sept. 11, 1986)  
 93 IBLA 351 (Sept. 15, 1986)  
 94 IBLA 209 (Nov. 4, 1986)  
 95 IBLA 140 (Jan. 12, 1987)  
 95 IBLA 221 (Jan. 15, 1987)  
 95 IBLA 239 (Jan. 16, 1987)  
 96 IBLA 1 (Feb. 25, 1987)  
 96 IBLA 286 (Mar. 30, 1987)  
 97 IBLA 74 (Apr. 28, 1987)  
 99 IBLA 194 (Oct. 13, 1987)  
 99 IBLA 301 (Oct. 27, 1987)  
 99 IBLA 307 (Oct. 27, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 256 (Mar. 2, 1988)  
 102 IBLA 342 (June 8, 1988)  
 103 IBLA 5 (June 22, 1988)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 105 IBLA 285 (Nov. 7, 1988)  
 105 IBLA 392 (Nov. 30, 1988)  
 106 IBLA 394 (Jan. 23, 1989)  
 107 IBLA 78 (Jan. 31, 1989)  
 107 IBLA 91 (Feb. 1, 1989)  
 111 IBLA 191 (Oct. 10, 1989)  
 112 IBLA 5 (Nov. 8, 1989)  
 112 IBLA 69 (Nov. 22, 1989)  
 226(c)(1) --- 112 IBLA 5 (Nov. 8, 1989)  
 226(d) ----- 100 IBLA 371, 95 I.D. 1 (1988)  
 226(e) ----- 85 IBLA 96 (Feb. 14, 1985)  
 88 IBLA 195 (Aug. 21, 1985)  
 88 IBLA 330 (Sept. 19, 1985)  
 93 IBLA 143 (July 30, 1986)  
 98 IBLA 143 (June 22, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 99 IBLA 53, 94 I.D. 394 (1987)  
 99 IBLA 164 (Oct. 2, 1987)  
 99 IBLA 245 (Oct. 20, 1987)  
 100 IBLA 37 (Nov. 19, 1987)  
 100 IBLA 313 (Dec. 28, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 215 (Feb. 26, 1988)  
 104 IBLA 133 (Sept. 2, 1988)  
 108 IBLA 96 (Mar. 29, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36953, 92 I.D. 293 (1985)  
 226(f) ----- 96 IBLA 80 (Mar. 2, 1987)  
 99 IBLA 164 (Oct. 2, 1987)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 215 (Feb. 26, 1988)  
 102 IBLA 352 (June 9, 1988)  
 108 IBLA 144 (Apr. 5, 1989)  
 109 IBLA 274 (June 20, 1989)  
 M-36951, 92 I.D. 537 (1985)  
 M-36953, 92 I.D. 293 (1985)  
 226(g) ----- 110 IBLA 250 (Sept. 11, 1989)  
 M-36953, 92 I.D. 293 (1985)  
 226(h) ----- 103 IBLA 192, 95 I.D. 102 (1988)  
 226(i) ----- 104 IBLA 133 (Sept. 2, 1988)  
 107 IBLA 223 (Feb. 21, 1989)  
 226(j) ----- 88 IBLA 172 (Aug. 20, 1985)  
 88 IBLA 195 (Aug. 21, 1985)  
 88 IBLA 330 (Sept. 19, 1985)  
 90 IBLA 388 (Feb. 28, 1986)

## TITLE 30: (Cont.)

sec. 226(j) ----- 92 IBLA 12 (May 6, 1986)  
 92 IBLA 46 (May 9, 1986)  
 92 IBLA 212, 93 I.D. 246 (1986)  
 93 IBLA 131 (July 29, 1986)  
 93 IBLA 143 (July 30, 1986)  
 96 IBLA 320, 94 I.D. 129 (1987)  
 96 IBLA 352 (Apr. 8, 1987)  
 97 IBLA 96 (Apr. 29, 1987)  
 97 IBLA 102 (Apr. 29, 1987)  
 97 IBLA 171 (May 7, 1987)  
 99 IBLA 53, 94 I.D. 394 (1987)  
 99 IBLA 245 (Oct. 20, 1987)  
 100 IBLA 352 (Jan. 12, 1988)  
 100 IBLA 371, 95 I.D. 1 (1988)  
 101 IBLA 13 (Jan. 22, 1988)  
 101 IBLA 298 (Mar. 16, 1988)  
 105 IBLA 84 (Oct. 19, 1988)  
 106 IBLA 23 (Dec. 6, 1988)  
 107 IBLA 161 (Feb. 10, 1989)  
 108 IBLA 20, 96 I.D. 127 (1989)  
 109 IBLA 274 (June 20, 1989)  
 110 IBLA 250 (Sept. 11, 1989)  
 110 IBLA 200, 96 I.D. 363 (1989)  
 111 IBLA 96 (Sept. 28, 1989)  
 M-36953, 92 I.D. 293 (1985)  
 226(m) ----- 108 IBLA 340 (May 9, 1989)  
 M-36958, 96 I.D. 15 (1989)  
 226-1(d) ---- 107 IBLA 10 (Jan. 24, 1989)  
 226-2 ----- 88 IBLA 13 (July 1, 1985)  
 88 IBLA 307 (Sept. 17, 1985)  
 90 IBLA 95 (Dec. 23, 1985)  
 93 IBLA 124 (July 29, 1986)  
 108 IBLA 231 (Apr. 24, 1989)  
 226-3 ----- 108 IBLA 43 (Mar. 21, 1989)  
 241 ----- 111 IBLA 1, 96 I.D. 408 (1989)  
 241(a) ----- 111 IBLA 1, 96 I.D. 408 (1989)  
 241(c) ----- 111 IBLA 1, 96 I.D. 408 (1989)  
 261 ----- 93 IBLA 283 (Aug. 29, 1986)  
 102 IBLA 308 (May 31, 1988)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 262 ----- 95 IBLA 69 (Dec. 22, 1986)  
 102 IBLA 308 (May 31, 1988)  
 111 IBLA 1, 96 I.D. 408 (1989)  
 271-273 ---- 111 IBLA 1, 96 I.D. 408 (1989)  
 271-276 ---- 111 IBLA 1, 96 I.D. 408 (1989)  
 281-283 ---- 111 IBLA 1, 96 I.D. 408 (1989)  
 281-287 ---- 111 IBLA 1, 96 I.D. 408 (1989)  
 282 ----- 106 IBLA 313 (Jan. 6, 1989)  
 108 IBLA 288 (Apr. 27, 1989)  
 301-306 ---- 85 IBLA 66 (Feb. 11, 1985)  
 351 ----- 91 IBLA 86 (Mar. 11, 1986)  
 95 IBLA 239 (Jan. 16, 1987)  
 102 IBLA 55 (Apr. 14, 1988)  
 351-359 ---- 88 IBLA 61 (July 22, 1985)  
 88 IBLA 268 (Sept. 4, 1985)  
 91 IBLA 143 (Mar. 24, 1986)  
 93 IBLA 117 (July 28, 1986)  
 95 IBLA 239 (Jan. 16, 1987)  
 96 IBLA 1 (Feb. 25, 1987)  
 99 IBLA 5 (Aug. 11, 1987)  
 102 IBLA 55 (Apr. 14, 1988)  
 102 IBLA 342 (June 8, 1988)  
 103 IBLA 247 (July 26, 1988)  
 105 IBLA 61 (Oct. 17, 1988)  
 106 IBLA 33 (Dec. 7, 1988)  
 351 et seq. - 90 IBLA 280 (Feb. 10, 1986)  
 95 IBLA 69 (Dec. 22, 1986)  
 M-36956, 95 I.D. 203 (1988)  
 352 ----- 85 IBLA 36 (Jan. 31, 1985)  
 85 IBLA 161 (Feb. 25, 1985)  
 85 IBLA 270 (Mar. 6, 1985)  
 85 IBLA 287 (Mar. 13, 1985)  
 87 IBLA 1 (May 17, 1985)



## TITLE 30: (Cont.)

sec. 253 ----- 88 IBLA 61 (July 22, 1985)  
 88 IBLA 163 (Aug. 16, 1985)  
 88 IBLA 268 (Sept. 4, 1985)  
 91 IBLA 143 (Mar. 24, 1986)  
 91 IBLA 384 (Apr. 28, 1986)  
 92 IBLA 18 (May 6, 1986)  
 93 IBLA 179 (Aug. 15, 1986)  
 93 IBLA 314 (Sept. 11, 1986)  
 94 IBLA 30 (Sept. 25, 1986)  
 95 IBLA 69 (Dec. 22, 1986)  
 95 IBLA 140 (Jan. 12, 1987)  
 95 IBLA 144, 94 I.D. 1 (1987)  
 95 IBLA 247 (Jan. 23, 1987)  
 95 IBLA 267 (Jan. 27, 1987)  
 97 IBLA 66 (Apr. 28, 1987)  
 99 IBLA 29 (Aug. 26, 1987)  
 99 IBLA 40 (Sept. 8, 1987)  
 100 IBLA 139 (Dec. 2, 1987)  
 101 IBLA 13 (Jan. 22, 1988)  
 101 IBLA 366 (Mar. 29, 1988)  
 102 IBLA 55 (Apr. 14, 1988)  
 104 IBLA 104 (Aug. 31, 1988)  
 105 IBLA 9 (Oct. 7, 1988)  
 105 IBLA 285 (Nov. 7, 1988)  
 M-36951, 92 I.D. 537 (1985)  
 352-359 ----- 99 IBLA 40 (Sept. 8, 1987)  
 354 ----- 85 IBLA 161 (Feb. 25, 1985)  
 101 IBLA 384 (Mar. 31, 1988)  
 108 IBLA 262 (Apr. 25, 1989)  
 355 ----- M-36956, 95 I.D. 203 (1988)  
 359 ----- 102 IBLA 55 (Apr. 14, 1988)  
 102 IBLA 342 (June 8, 1988)  
 521(a)(1) --- 112 IBLA 248 (Dec. 28, 1989)  
 528(2) ----- 87 IBLA 350 (June 27, 1985)  
 601 ----- 95 IBLA 107 (Jan. 6, 1987)  
 95 IBLA 144, 94 I.D. 1 (1987)  
 98 IBLA 325 (July 31, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 100 IBLA 185, 94 I.D. 453 (1987)  
 100 IBLA 322 (Dec. 31, 1987)  
 105 IBLA 252 (Nov. 4, 1988)  
 111 IBLA 122 (Sept. 29, 1989)  
 112 IBLA 51 (Nov. 20, 1989)  
 6 OHA 52 (June 28, 1985)  
 601-604 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 95 IBLA 107 (Jan. 6, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 100 IBLA 322 (Dec. 31, 1987)  
 601-612 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 601-615 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 92 IBLA 58 (May 13, 1986)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 602 ----- 95 IBLA 144, 94 I.D. 1 (1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 602(a) ----- 95 IBLA 144, 94 I.D. 1 (1987)  
 611 ----- 89 IBLA 350 (Nov. 20, 1985)  
 90 IBLA 255 (Jan. 31, 1986)  
 92 IBLA 58 (May 13, 1986)  
 92 IBLA 109, 93 I.D. 211 (1986)  
 93 IBLA 1, 93 I.D. 288 (1986)  
 95 IBLA 55 (Dec. 19, 1986)  
 95 IBLA 271 (Jan. 29, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 100 IBLA 185, 94 I.D. 453 (1987)  
 100 IBLA 322 (Dec. 31, 1987)  
 103 IBLA 392 (Aug. 15, 1988)  
 104 IBLA 93 (Aug. 31, 1988)  
 105 IBLA 252 (Nov. 4, 1988)  
 110 IBLA 1 (July 5, 1989)  
 112 IBLA 51 (Nov. 20, 1989)  
 611-613 ----- 111 IBLA 364 (Nov. 3, 1989)  
 611-615 ----- 112 IBLA 51 (Nov. 20, 1989)

## TITLE 30: (Cont.)

sec. 612 ----- 86 IBLA 181, 92 I.D. 175 (1985)  
 86 IBLA 350, 92 I.D. 208 (1985)  
 111 IBLA 152 (Oct. 2, 1989)  
 612(a) ----- 102 IBLA 276 (May 24, 1988)  
 110 IBLA 39, 96 I.D. 315 (1989)  
 612(b) ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 110 IBLA 39, 96 I.D. 315 (1989)  
 612(c) ----- 110 IBLA 39, 96 I.D. 315 (1989)  
 613 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 87 IBLA 216 (June 18, 1985)  
 92 IBLA 58 (May 13, 1986)  
 613(b) ----- 92 IBLA 58 (May 13, 1986)  
 621 ----- 85 IBLA 241 (Mar. 4, 1985)  
 86 IBLA 181, 92 I.D. 175 (1985)  
 88 IBLA 273 (Sept. 5, 1985)  
 89 IBLA 209 (Oct. 25, 1985)  
 90 IBLA 30 (Dec. 5, 1985)  
 94 IBLA 374 (Dec. 4, 1986)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 621-625 ----- 86 IBLA 181, 92 I.D. 175 (1985)  
 88 IBLA 273 (Sept. 5, 1985)  
 94 IBLA 374 (Dec. 4, 1986)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 110 IBLA 245 (Aug. 31, 1989)  
 621(a) ----- 85 IBLA 241 (Mar. 4, 1985)  
 86 IBLA 16 (Mar. 29, 1985)  
 86 IBLA 181, 92 I.D. 175 (1985)  
 87 IBLA 126 (June 5, 1985)  
 93 IBLA 346 (Sept. 11, 1986)  
 94 IBLA 374 (Dec. 4, 1986)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 108 IBLA 330 (May 2, 1989)  
 112 IBLA 233 (Dec. 20, 1989)  
 621(b) ----- 86 IBLA 181, 92 I.D. 175 (1985)  
 90 IBLA 30 (Dec. 5, 1985)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 623 ----- 90 IBLA 30 (Dec. 5, 1985)  
 104 IBLA 207, 95 I.D. 155 (1988)  
 109 IBLA 198, 96 I.D. 272 (1989)  
 110 IBLA 245 (Aug. 31, 1989)  
 701 ----- 94 IBLA 162 (Oct. 28, 1986)  
 98 IBLA 157 (June 24, 1987)  
 701(28) ----- 89 IBLA 195 (Oct. 17, 1985)  
 819(a)(4) --- 6 OHA 86 (Nov. 8, 1985)  
 1001 ----- 102 IBLA 187 (May 5, 1988)  
 104 IBLA 201 (Sept. 12, 1988)  
 1001-1025 ----- 85 IBLA 254, 92 I.D. 125 (1985)  
 1001 et seq. - 100 IBLA 282 (Dec. 16, 1987)  
 1001(e) ----- 104 IBLA 201 (Sept. 12, 1988)  
 1002 ----- 87 IBLA 1 (May 17, 1985)  
 109 IBLA 220 (June 15, 1989)  
 1003 ----- 87 IBLA 1 (May 17, 1985)  
 98 IBLA 321 (July 30, 1987)  
 104 IBLA 201 (Sept. 12, 1988)  
 1004(a) ----- 100 IBLA 282 (Dec. 16, 1987)  
 1004(c) ----- 102 IBLA 46 (Apr. 13, 1988)  
 109 IBLA 220 (June 15, 1989)  
 1006 ----- 87 IBLA 1 (May 17, 1985)  
 1014 ----- 87 IBLA 1 (May 17, 1985)  
 109 IBLA 220 (June 15, 1989)  
 1014(b) ----- 87 IBLA 1 (May 17, 1985)  
 1023 ----- 100 IBLA 282 (Dec. 16, 1987)  
 1201 ----- 86 IBLA 153 (Apr. 25, 1985)  
 89 IBLA 1, 92 I.D. 389 (1985)  
 90 IBLA 43 (Dec. 10, 1985)  
 92 IBLA 282 (June 25, 1986)  
 92 IBLA 381 (July 14, 1986)  
 93 IBLA 194 (Aug. 15, 1986)  
 94 IBLA 14 (Sept. 19, 1986)  
 99 IBLA 242 (Oct. 20, 1987)  
 99 IBLA 257 (Oct. 20, 1987)

## TITLE 30: (Cont.)

sec. 1201 ----- 108 IBLA 177 (Apr. 12, 1989)  
 108 IBLA 303 (Apr. 28, 1989)  
 111 IBLA 239 (Oct. 24, 1989)  
 1201-1328 ---- 95 IBLA 360 (Feb. 18, 1987)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 99 IBLA 274 (Oct. 20, 1987)  
 99 IBLA 349 (Nov. 3, 1987)  
 103 IBLA 10 (June 22, 1988)  
 103 IBLA 44 (June 27, 1988)  
 104 IBLA 331, 95 I.D. 181 (1988)  
 105 IBLA 29 (Oct. 14, 1988)  
 105 IBLA 53 (Oct. 17, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 107 IBLA 278 (Feb. 23, 1989)  
 107 IBLA 307 (Mar. 2, 1989)  
 108 IBLA 70, 96 I.D. 139 (1989)  
 110 IBLA 345 (Sept. 14, 1989)  
 111 IBLA 316 (Oct. 30, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 1201 et seq. - 98 IBLA 56 (June 8, 1987)  
 104 IBLA 1 (Aug. 15, 1988)  
 1201(h) ----- 111 IBLA 316 (Oct. 30, 1989)  
 1202 ----- 97 IBLA 314 (May 19, 1987)  
 1202(a) ----- 93 IBLA 225 (Aug. 22, 1986)  
 109 IBLA 213 (June 12, 1989)  
 1202(b) ----- 98 IBLA 325 (July 31, 1987)  
 1202(d) ----- 103 IBLA 48 (June 28, 1988)  
 107 IBLA 307 (Mar. 2, 1989)  
 1202(e) ----- 101 IBLA 6 (Jan. 22, 1988)  
 103 IBLA 48 (June 28, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 1202(h) ----- 111 IBLA 316 (Oct. 30, 1989)  
 1231-1243 ---- 88 IBLA 224, 92 I.D. 363 (1985)  
 1232 ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 97 IBLA 18 (Apr. 22, 1987)  
 102 IBLA 100 (Apr. 18, 1988)  
 104 IBLA 1 (Aug. 15, 1988)  
 112 IBLA 248 (Dec. 28, 1989)  
 1232(a) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 112 IBLA 248 (Dec. 28, 1989)  
 1232(b) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 1232(e) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 112 IBLA 248 (Dec. 28, 1989)  
 1232(g)(2) --- 109 IBLA 40, 96 I.D. 239 (1989)  
 1235 ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1251 ----- 93 IBLA 225 (Aug. 22, 1986)  
 109 IBLA 213 (June 12, 1989)  
 1251-1279 ---- 88 IBLA 224, 92 I.D. 363 (1985)  
 1252 ----- 87 IBLA 350 (June 27, 1985)  
 93 IBLA 386 (Sept. 17, 1986)  
 94 IBLA 14 (Sept. 19, 1986)  
 96 IBLA 52 (Feb. 27, 1987)  
 96 IBLA 338 (Apr. 7, 1987)  
 101 IBLA 144 (Feb. 8, 1988)  
 101 IBLA 167 (Feb. 17, 1988)  
 102 IBLA 19 (Apr. 6, 1988)  
 103 IBLA 10 (June 22, 1988)  
 105 IBLA 69 (Oct. 18, 1988)  
 108 IBLA 303 (Apr. 28, 1989)  
 1252(a) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 93 IBLA 386 (Sept. 17, 1986)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 101 IBLA 167 (Feb. 17, 1988)  
 1252(b) ----- 96 IBLA 52 (Feb. 27, 1987)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 101 IBLA 167 (Feb. 17, 1988)  
 1252(c) ----- 97 IBLA 285, 94 I.D. 181 (1987)  
 101 IBLA 144 (Feb. 8, 1988)  
 1252(d) ----- 103 IBLA 10 (June 22, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 1252(e) ----- 101 IBLA 167 (Feb. 17, 1988)

## TITLE 30: (Cont.)

sec. 1253 ----- 89 IBLA 129 (Sept. 30, 1985)  
 93 IBLA 386 (Sept. 17, 1986)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 99 IBLA 87 (Sept. 15, 1987)  
 101 IBLA 167 (Feb. 17, 1988)  
 104 IBLA 24 (Aug. 19, 1988)  
 109 IBLA 40, 96 I.D. 239 (1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 111 IBLA 289 (Oct. 26, 1989)  
 1253(a) ----- 108 IBLA 303 (Apr. 28, 1989)  
 110 IBLA 345 (Sept. 14, 1989)  
 1253(b)(4) --- 112 IBLA 166 (Dec. 11, 1989)  
 1253(d) ----- 102 IBLA 111 (Apr. 20, 1988)  
 1254 ----- 89 IBLA 129 (Sept. 30, 1985)  
 104 IBLA 24 (Aug. 19, 1988)  
 1254(a) ----- 97 IBLA 314 (May 19, 1987)  
 1254(b) ----- 92 IBLA 320 (June 26, 1986)  
 110 IBLA 345 (Sept. 14, 1989)  
 1256 ----- 87 IBLA 369 (June 28, 1985)  
 1256(a) ----- 87 IBLA 350 (June 27, 1985)  
 88 IBLA 224, 92 I.D. 363 (1985)  
 89 IBLA 195 (Oct. 17, 1985)  
 93 IBLA 386 (Sept. 17, 1986)  
 94 IBLA 14 (Sept. 19, 1986)  
 101 IBLA 144 (Feb. 8, 1988)  
 101 IBLA 282 (Mar. 15, 1988)  
 103 IBLA 10 (June 22, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 107 IBLA 210 (Feb. 16, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 112 IBLA 107 (Nov. 30, 1989)  
 1256(b) ----- 112 IBLA 115 (Nov. 30, 1989)  
 1256(d) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 112 IBLA 115 (Nov. 30, 1989)  
 1257(b)(11) -- 89 IBLA 1, 92 I.D. 389 (1985)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 1257(b)(13) -- 109 IBLA 362 (June 23, 1989)  
 1257(d) ----- 112 IBLA 218 (Dec. 19, 1989)  
 1257(g) ----- 99 IBLA 285 (Oct. 23, 1987)  
 1258 ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 112 IBLA 218 (Dec. 19, 1989)  
 1258(a) ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 1258(a)(13) -- 89 IBLA 1, 92 I.D. 389 (1985)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 1259(a) ----- 103 IBLA 366 (Aug. 12, 1988)  
 1259(b) ----- 95 IBLA 182 (Jan. 13, 1987)  
 110 IBLA 119 (Aug. 8, 1989)  
 1260 ----- 111 IBLA 239 (Oct. 24, 1989)  
 1260(a) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 91 IBLA 59 (Feb. 28, 1986)  
 97 IBLA 314 (May 19, 1987)  
 1260(b) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 97 IBLA 314 (May 19, 1987)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 1260(b)(1) --- 89 IBLA 1, 92 I.D. 389 (1985)  
 1260(b)(3) --- 94 IBLA 269, 93 I.D. 417 (1986)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 1260(b)(4) --- 112 IBLA 115 (Nov. 30, 1989)  
 1260(b)(5) --- 112 IBLA 115 (Nov. 30, 1989)  
 1260(c) ----- 99 IBLA 274 (Oct. 20, 1987)  
 1260(d) ----- 112 IBLA 115 (Nov. 30, 1989)  
 1260(d)(1) --- 93 IBLA 225 (Aug. 22, 1986)  
 1261 ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 1261(a)(2) --- 89 IBLA 1, 92 I.D. 389 (1985)  
 1261(b) ----- 102 IBLA 93 (Apr. 15, 1988)  
 1262 ----- 106 IBLA 179, 95 I.D. 293 (1988)  
 1262(a) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1262(d) ----- 106 IBLA 179, 95 I.D. 293 (1988)  
 1263 ----- 97 IBLA 314 (May 19, 1987)  
 110 IBLA 98 (Aug. 3, 1989)  
 1263(a) ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1263(b) ----- 109 IBLA 40, 96 I.D. 239 (1989)

## TITLE 30: (Cont.)

sec. 1264 ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 97 IBLA 314 (May 19, 1987)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 1264(a) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 1264(b) ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 1264(c) ----- 91 IBLA 59 (Feb. 28, 1986)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 109 IBLA 242 (June 16, 1989)  
 109 IBLA 374 (June 23, 1989)  
 1264(d) ----- 109 IBLA 374 (June 23, 1989)  
 1264(f) ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 109 IBLA 374 (June 23, 1989)  
 1265 ----- 95 IBLA 182 (Jan. 13, 1987)  
 95 IBLA 360 (Feb. 18, 1987)  
 99 IBLA 257 (Oct. 20, 1987)  
 111 IBLA 289 (Oct. 26, 1989)  
 1265(a) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 89 IBLA 1, 92 I.D. 389 (1985)  
 1265(b) ----- 101 IBLA 84 (Feb. 2, 1988)  
 105 IBLA 29 (Oct. 14, 1988)  
 1265(b)(2) --- 101 IBLA 84 (Feb. 2, 1988)  
 107 IBLA 278 (Feb. 23, 1989)  
 1265(b)(3) --- 94 IBLA 183 (Oct. 30, 1986)  
 96 IBLA 97 (Mar. 9, 1987)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 101 IBLA 84 (Feb. 2, 1988)  
 102 IBLA 19 (Apr. 6, 1988)  
 103 IBLA 25 (June 23, 1988)  
 107 IBLA 278 (Feb. 23, 1989)  
 108 IBLA 70, 96 I.D. 139 (1989)  
 110 IBLA 185 (Aug. 17, 1989)  
 1265(b)(5) --- 107 IBLA 278 (Feb. 23, 1989)  
 1265(b)(6) --- 101 IBLA 84 (Feb. 2, 1988)  
 107 IBLA 278 (Feb. 23, 1989)  
 1265(b)(8) --- 107 IBLA 278 (Feb. 23, 1989)  
 1265(b)(10) -- 105 IBLA 29 (Oct. 14, 1988)  
 111 IBLA 239 (Oct. 24, 1989)  
 1265(b)(10)(A) 111 IBLA 239 (Oct. 24, 1989)  
 1265(b)(10) (A)(ii) ----- 110 IBLA 119 (Aug. 8, 1989)  
 1265(b)(10) (B)(ii) ----- 95 IBLA 360 (Feb. 18, 1987)  
 98 IBLA 26 (June 2, 1987)  
 103 IBLA 10 (June 22, 1988)  
 1265(b)(14) -- 111 IBLA 239 (Oct. 24, 1989)  
 1265(b)(15) -- 99 IBLA 285 (Oct. 23, 1987)  
 105 IBLA 160 (Oct. 28, 1988)  
 1265(b) (15)(C) ----- 99 IBLA 285 (Oct. 23, 1987)  
 105 IBLA 160 (Oct. 28, 1988)  
 1265(b)(19) -- 95 IBLA 182 (Jan. 13, 1987)  
 1265(b)(20) -- 105 IBLA 29 (Oct. 14, 1988)  
 1265(b)(21) -- 103 IBLA 25 (June 23, 1988)  
 1265(d) ----- 102 IBLA 111 (Apr. 20, 1988)  
 1265(d)(2) --- 94 IBLA 183 (Oct. 30, 1986)  
 102 IBLA 19 (Apr. 6, 1988)  
 1265(e) ----- 94 IBLA 183 (Oct. 30, 1986)  
 102 IBLA 19 (Apr. 6, 1988)  
 102 IBLA 111 (Apr. 20, 1988)  
 1265(19) ----- 102 IBLA 84 (Feb. 2, 1988)  
 1266 ----- 103 IBLA 286 (Aug. 3, 1988)  
 1266(a) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 1266(b) ----- 89 IBLA 1, 92 I.D. 389 (1985)  
 1266(b)(1) --- 89 IBLA 1, 92 I.D. 389 (1985)  
 1266(b)(3) --- 89 IBLA 1, 92 I.D. 389 (1985)  
 1266(b)(10) -- 87 IBLA 369 (June 28, 1985)  
 1267 ----- 101 IBLA 144 (Feb. 8, 1988)  
 108 IBLA 303 (Apr. 28, 1989)  
 1267(a) ----- 87 IBLA 369 (June 28, 1985)  
 102 IBLA 111 (Apr. 20, 1988)  
 1267(b) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 105 IBLA 29 (Oct. 14, 1988)

## TITLE 30: (Cont.)

sec. 1267(b)(3) --- 101 IBLA 144 (Feb. 8, 1988)  
 1267(e) ----- 103 IBLA 48 (June 28, 1988)  
 1267(h) ----- 96 IBLA 216, 94 I.D. 89 (1987)  
 107 IBLA 278 (Feb. 23, 1989)  
 1267(h)(1) --- 96 IBLA 216, 94 I.D. 89 (1987)  
 1268 ----- 89 IBLA 195 (Oct. 17, 1985)  
 90 IBLA 186, 93 I.D. 1 (1986)  
 101 IBLA 224 (Feb. 26, 1988)  
 101 IBLA 229 (Feb. 26, 1988)  
 102 IBLA 111 (Apr. 20, 1988)  
 1268(a) ----- 90 IBLA 186, 93 I.D. 1 (1986)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 98 IBLA 171 (June 24, 1987)  
 99 IBLA 274 (Oct. 20, 1987)  
 102 IBLA 93 (Apr. 15, 1988)  
 103 IBLA 25 (June 23, 1988)  
 103 IBLA 48 (June 28, 1988)  
 103 IBLA 356 (Aug. 11, 1988)  
 1268(b) ----- 107 IBLA 339, 96 I.D. 83 (1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 1268(c) ----- 85 IBLA 146 (Feb. 21, 1985)  
 92 IBLA 371 (July 1, 1986)  
 101 IBLA 224 (Feb. 26, 1988)  
 103 IBLA 48 (June 28, 1988)  
 103 IBLA 356 (Aug. 11, 1988)  
 105 IBLA 385 (Nov. 29, 1988)  
 111 IBLA 115 (Sept. 28, 1989)  
 Secy Order, 94 I.D. 349 (1987)  
 1268(f) ----- 97 IBLA 285, 94 I.D. 181 (1987)  
 1268(h) ----- 90 IBLA 186, 93 I.D. 1 (1986)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 98 IBLA 171 (June 24, 1987)  
 101 IBLA 144 (Feb. 8, 1988)  
 103 IBLA 356 (Aug. 11, 1988)  
 Secy Order, 94 I.D. 349 (1987)  
 1269 ----- 112 IBLA 218 (Dec. 19, 1989)  
 1269(c) ----- 105 IBLA 29 (Oct. 14, 1988)  
 112 IBLA 218 (Dec. 19, 1989)  
 1269(c)(2) --- 93 IBLA 225 (Aug. 22, 1986)  
 1269(c)(3) --- 105 IBLA 29 (Oct. 14, 1988)  
 1270 ----- 101 IBLA 282 (Mar. 15, 1988)  
 1271 ----- 95 IBLA 182 (Jan. 13, 1987)  
 96 IBLA 338 (Apr. 7, 1987)  
 99 IBLA 285 (Oct. 23, 1987)  
 100 IBLA 300 (Dec. 23, 1987)  
 101 IBLA 190 (Feb. 17, 1988)  
 104 IBLA 1 (Aug. 15, 1988)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 112 IBLA 248 (Dec. 28, 1989)  
 1271(a) ----- 92 IBLA 4 (Apr. 30, 1986)  
 92 IBLA 23, 93 I.D. 199 (1986)  
 92 IBLA 320 (June 26, 1986)  
 93 IBLA 225 (Aug. 22, 1986)  
 95 IBLA 182 (Jan. 13, 1987)  
 98 IBLA 26 (June 2, 1987)  
 100 IBLA 300 (Dec. 23, 1987)  
 100 IBLA 365 (Jan. 12, 1988)  
 102 IBLA 93 (Apr. 15, 1988)  
 102 IBLA 111 (Apr. 20, 1988)  
 103 IBLA 25 (June 23, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 105 IBLA 385 (Nov. 29, 1988)  
 107 IBLA 210 (Feb. 16, 1989)  
 109 IBLA 213 (June 12, 1989)  
 110 IBLA 119 (Aug. 8, 1989)  
 111 IBLA 289 (Oct. 26, 1989)  
 1271(a)(1) --- 88 IBLA 24 (July 5, 1985)  
 89 IBLA 195 (Oct. 17, 1985)  
 93 IBLA 225 (Aug. 22, 1986)  
 93 IBLA 386 (Sept. 17, 1986)  
 95 IBLA 182 (Jan. 13, 1987)  
 95 IBLA 204, 94 I.D. 12 (1987)  
 96 IBLA 52 (Feb. 27, 1987)



## TITLE 30: (Cont.)

sec. 1271(a)(1) --- 96 IBLA 333 (Apr. 7, 1987)  
 96 IBLA 216, 94 I.D. 89 (1987)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 98 IBLA 26 (June 2, 1987)  
 99 IBLA 87 (Sept. 15, 1987)  
 100 IBLA 300 (Dec. 23, 1987)  
 101 IBLA 84 (Feb. 2, 1988)  
 101 IBLA 167 (Feb. 17, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 105 IBLA 160 (Oct. 28, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 108 IBLA 303 (Apr. 28, 1989)  
 109 IBLA 213 (June 12, 1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 112 IBLA 248 (Dec. 28, 1989)  
 1271(a)(2) --- 96 IBLA 216, 94 I.D. 89 (1987)  
 99 IBLA 285 (Oct. 23, 1987)  
 101 IBLA 144 (Feb. 8, 1988)  
 101 IBLA 190 (Feb. 17, 1988)  
 101 IBLA 282 (Mar. 15, 1988)  
 103 IBLA 48 (June 28, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 107 IBLA 210 (Feb. 16, 1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 112 IBLA 107 (Nov. 30, 1989)  
 1271(a)(3) --- 87 IBLA 350 (June 27, 1985)  
 96 IBLA 266 (Mar. 26, 1987)  
 96 IBLA 338 (Apr. 7, 1987)  
 97 IBLA 18 (Apr. 22, 1987)  
 97 IBLA 285, 94 I.D. 181 (1987)  
 98 IBLA 26 (June 2, 1987)  
 98 IBLA 171 (June 24, 1987)  
 99 IBLA 285 (Oct. 23, 1987)  
 101 IBLA 6 (Jan. 22, 1988)  
 101 IBLA 144 (Feb. 8, 1988)  
 101 IBLA 190 (Feb. 17, 1988)  
 102 IBLA 19 (Apr. 6, 1988)  
 102 IBLA 93 (Apr. 15, 1988)  
 103 IBLA 48 (June 28, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 103 IBLA 356 (Aug. 11, 1988)  
 104 IBLA 1 (Aug. 15, 1988)  
 104 IBLA 258 (Sept. 13, 1988)  
 107 IBLA 246 (Feb. 22, 1989)  
 111 IBLA 289 (Oct. 26, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 112 IBLA 153 (Dec. 7, 1989)  
 1271(a)(5) --- 93 IBLA 386 (Sept. 17, 1986)  
 94 IBLA 183 (Oct. 30, 1986)  
 98 IBLA 26 (June 2, 1987)  
 102 IBLA 111 (Apr. 20, 1988)  
 103 IBLA 48 (June 28, 1988)  
 1271(b) ----- 92 IBLA 320 (June 26, 1986)  
 92 IBLA 381 (July 14, 1986)  
 93 IBLA 194 (Aug. 15, 1986)  
 93 IBLA 386 (Sept. 17, 1986)  
 98 IBLA 395 (Aug. 6, 1987)  
 99 IBLA 285 (Oct. 23, 1987)  
 99 IBLA 349 (Nov. 3, 1987)  
 100 IBLA 365 (Jan. 12, 1988)  
 101 IBLA 282 (Mar. 15, 1988)  
 101 IBLA 327 (Mar. 21, 1988)  
 102 IBLA 93 (Apr. 15, 1988)  
 102 IBLA 111 (Apr. 20, 1988)  
 102 IBLA 299, 95 I.D. 75 (1988)  
 102 IBLA 323 (June 3, 1988)  
 103 IBLA 10 (June 22, 1988)  
 103 IBLA 124 (July 19, 1988)  
 103 IBLA 286 (Aug. 3, 1988)  
 105 IBLA 29 (Oct. 14, 1988)  
 107 IBLA 307 (Mar. 2, 1989)  
 108 IBLA 303 (Apr. 28, 1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 110 IBLA 345 (Sept. 14, 1989)  
 112 IBLA 166 (Dec. 11, 1989)

## TITLE 30: (Cont.)

sec. 1272 ----- 107 IBLA 339, 96 I.D. 83 (1989)  
 1272(a)(2) --- 97 IBLA 314 (May 19, 1987)  
 1272(a)(3) --- 97 IBLA 314 (May 19, 1987)  
 1272(a)(6) --- 98 IBLA 306 (July 30, 1987)  
 1272(b) ----- 97 IBLA 314 (May 19, 1987)  
 1272(c) ----- 96 IBLA 126 (Mar. 11, 1987)  
 97 IBLA 314 (May 19, 1987)  
 1272(e) ----- 88 IBLA 286, 92 I.D. 383 (1985)  
 97 IBLA 314 (May 19, 1987)  
 108 IBLA 1 (Mar. 20, 1989)  
 110 IBLA 345 (Sept. 14, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 1272(e)(1) --- 110 IBLA 345 (Sept. 14, 1989)  
 1272(e)(2) --- 110 IBLA 345 (Sept. 14, 1989)  
 1272(e)(3) --- 109 IBLA 362 (June 23, 1989)  
 1272(e)(4) --- 96 IBLA 126 (Mar. 11, 1987)  
 110 IBLA 345 (Sept. 14, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 1272(e)(5) --- 110 IBLA 345 (Sept. 14, 1989)  
 1273(c) ----- 92 IBLA 4 (Apr. 30, 1986)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 105 IBLA 53 (Oct. 17, 1988)  
 108 IBLA 1 (Mar. 20, 1989)  
 109 IBLA 40, 96 I.D. 239 (1989)  
 1274 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1275 ----- 87 IBLA 350 (June 27, 1985)  
 88 IBLA 24 (July 5, 1985)  
 88 IBLA 126 (Aug. 2, 1985)  
 92 IBLA 23, 93 I.D. 199 (1986)  
 93 IBLA 386 (Sept. 17, 1986)  
 94 IBLA 183 (Oct. 30, 1986)  
 96 IBLA 266 (Mar. 26, 1987)  
 98 IBLA 171 (June 24, 1987)  
 98 IBLA 395 (Aug. 6, 1987)  
 100 IBLA 300 (Dec. 23, 1987)  
 101 IBLA 144 (Feb. 8, 1988)  
 102 IBLA 299, 95 I.D. 75 (1988)  
 104 IBLA 258 (Sept. 13, 1988)  
 107 IBLA 307 (Mar. 2, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 1275(a) ----- 97 IBLA 78 (Apr. 28, 1987)  
 102 IBLA 111 (Apr. 20, 1988)  
 1275(a)(1) --- 98 IBLA 26 (June 2, 1987)  
 103 IBLA 48 (June 28, 1988)  
 1275(a)(2) --- 107 IBLA 339, 96 I.D. 83 (1989)  
 1275(b) ----- 94 IBLA 183 (Oct. 30, 1986)  
 101 IBLA 190 (Feb. 17, 1988)  
 1275(c) ----- 87 IBLA 350 (June 27, 1985)  
 89 IBLA 129 (Sept. 30, 1985)  
 92 IBLA 4 (Apr. 30, 1986)  
 101 IBLA 190 (Feb. 17, 1988)  
 110 IBLA 98 (Aug. 3, 1989)  
 1275(c)(1) --- 89 IBLA 129 (Sept. 30, 1985)  
 1275(c)(2) --- 89 IBLA 129 (Sept. 30, 1985)  
 101 IBLA 144 (Feb. 8, 1988)  
 1275(c)(3) --- 89 IBLA 129 (Sept. 30, 1985)  
 1275(e) ----- 88 IBLA 126 (Aug. 2, 1985)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 103 IBLA 187 (July 21, 1988)  
 107 IBLA 339, 96 I.D. 83 (1989)  
 108 IBLA 114 (Mar. 30, 1989)  
 111 IBLA 197 (Oct. 11, 1989)  
 1276 ----- 94 IBLA 269, 93 I.D. 417 (1986)  
 109 IBLA 374 (June 23, 1989)  
 1276(a) ----- 103 IBLA 187 (July 21, 1988)  
 1276(a)(1) --- 92 IBLA 381 (July 14, 1986)  
 93 IBLA 194 (Aug. 15, 1986)  
 95 IBLA 182 (Jan. 13, 1987)  
 100 IBLA 300 (Dec. 23, 1987)  
 100 IBLA 365 (Jan. 12, 1988)  
 101 IBLA 327 (Mar. 21, 1988)  
 102 IBLA 323 (June 3, 1988)  
 103 IBLA 124 (July 19, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 109 IBLA 362 (June 23, 1989)

## TITLE 30: (Cont.)

sec. 1276(c) ----- 89 IBLA 129 (Sept. 30, 1985)  
 101 IBLA 190 (Feb. 17, 1988)  
 103 IBLA 264 (Aug. 1, 1988)  
 109 IBLA 374 (June 23, 1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 1278 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 94 IBLA 14 (Sept. 19, 1986)  
 97 IBLA 78 (Apr. 28, 1987)  
 102 IBLA 100 (Apr. 18, 1988)  
 1278(c) ----- 101 IBLA 229 (Feb. 26, 1988)  
 1278(2) ----- 87 IBLA 350 (June 27, 1985)  
 88 IBLA 24 (July 5, 1985)  
 102 IBLA 100 (Apr. 18, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 110 IBLA 185 (Aug. 17, 1989)  
 1278(3) ----- 112 IBLA 107 (Nov. 30, 1989)  
 1281 ----- 86 IBLA 60 (Apr. 10, 1985)  
 1291 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 95 IBLA 1, 93 I.D. 460 (1986)  
 89 IBLA 1, 92 I.D. 389 (1985)  
 1291(1) ----- 94 IBLA 183 (Oct. 30, 1986)  
 1291(2) ----- 96 IBLA 97 (Mar. 9, 1987)  
 109 IBLA 40, 96 I.D. 239 (1989)  
 1291(4) ----- 110 IBLA 345 (Sept. 14, 1989)  
 1291(6) ----- 96 IBLA 216, 94 I.D. 89 (1987)  
 1291(8) ----- 107 IBLA 246 (Feb. 22, 1989)  
 109 IBLA 40, 96 I.D. 239 (1989)  
 1291(11) ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1291(13) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 99 IBLA 274 (Oct. 20, 1987)  
 105 IBLA 69 (Oct. 18, 1988)  
 1291(17) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1291(19) ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1291(25) ----- 101 IBLA 128, 95 I.D. 16 (1988)  
 1291(27) ----- 103 IBLA 286 (Aug. 3, 1988)  
 105 IBLA 29 (Oct. 14, 1988)  
 107 IBLA 278 (Feb. 23, 1989)  
 109 IBLA 286 (Aug. 3, 1988)  
 105 IBLA 29 (Oct. 14, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 107 IBLA 210 (Feb. 16, 1989)  
 107 IBLA 278 (Feb. 23, 1989)  
 110 IBLA 98 (Aug. 3, 1989)  
 110 IBLA 345 (Sept. 14, 1989)  
 112 IBLA 19, 96 I.D. 455 (1989)  
 1291(28) ----- 88 IBLA 286, 92 I.D. 383 (1985)  
 101 IBLA 282 (Mar. 15, 1988)  
 102 IBLA 100 (Apr. 18, 1988)  
 106 IBLA 179, 95 I.D. 293 (1988)  
 107 IBLA 210 (Feb. 16, 1989)  
 112 IBLA 115 (Nov. 30, 1989)  
 1291(28)(B) -- 87 IBLA 369 (June 28, 1985)  
 89 IBLA 195 (Oct. 17, 1985)  
 110 IBLA 98 (Aug. 3, 1989)  
 88 IBLA 224, 92 I.D. 363 (1985)  
 1293 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1293(a) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1293(b) ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1300(a) ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1300(h) ----- 109 IBLA 40, 96 I.D. 239 (1989)  
 1304 ----- 93 IBLA 221 (Aug. 20, 1986)  
 98 IBLA 325 (July 31, 1987)  
 1305 ----- 98 IBLA 325 (July 31, 1987)  
 1328 ----- 108 IBLA 303 (Apr. 28, 1989)  
 1337(a) ----- 98 IBLA 218, 94 I.D. 329 (1987)  
 1341 ----- 88 IBLA 210 (Aug. 28, 1985)  
 1342 ----- 88 IBLA 210 (Aug. 28, 1985)  
 1344 ----- 88 IBLA 210 (Aug. 28, 1985)

## TITLE 30: (Cont.)

sec. 1350(b) ----- 110 IBLA 282, 96 I.D. 367 (1989)  
 1401 et seq. - M-36952, 92 I.D. 459 (1985)  
 1401(a)(7) --- M-36952, 92 I.D. 459 (1985)  
 1401(a)(12) -- M-36952, 92 I.D. 459 (1985)  
 1401(a)(16) -- M-36952, 92 I.D. 459 (1985)  
 1401(b)(3) --- M-36952, 92 I.D. 459 (1985)  
 1402(a)(1) --- M-36952, 92 I.D. 459 (1985)  
 1402(a)(2) --- M-36952, 92 I.D. 459 (1985)  
 1403(2) ----- M-36952, 92 I.D. 459 (1985)  
 1403(4) ----- M-36952, 92 I.D. 459 (1985)  
 1403(6) ----- M-36952, 92 I.D. 459 (1985)  
 1403(11) ----- M-36952, 92 I.D. 459 (1985)  
 1412 ----- M-36952, 92 I.D. 459 (1985)  
 1414 ----- M-36952, 92 I.D. 459 (1985)  
 1417 ----- M-36952, 92 I.D. 459 (1985)  
 1428 ----- M-36952, 92 I.D. 459 (1985)  
 1472(a) ----- M-36952, 92 I.D. 459 (1985)  
 1472(d) ----- M-36952, 92 I.D. 459 (1985)  
 1701 ----- 93 IBLA 267 (Aug. 29, 1986)  
 97 IBLA 387 (May 27, 1987)  
 102 IBLA 86 (Apr. 14, 1988)  
 104 IBLA 291 (Sept. 14, 1988)  
 111 IBLA 181 (Oct. 6, 1989)  
 1701-1757 ---- 89 IBLA 316 (Nov. 12, 1985)  
 96 IBLA 327 (Apr. 7, 1987)  
 97 IBLA 387 (May 27, 1987)  
 102 IBLA 396 (June 21, 1988)  
 108 IBLA 62 (Mar. 22, 1989)  
 108 IBLA 387 (May 22, 1989)  
 110 IBLA 127 (Aug. 8, 1989)  
 112 IBLA 1 (Nov. 8, 1989)  
 1701 et seq. - M-36956, 95 I.D. 203 (1988)  
 1701(a) ----- 93 IBLA 267 (Aug. 29, 1986)  
 1701(b)(2) --- 106 IBLA 104, 95 I.D. 265 (1988)  
 107 IBLA 91 (Feb. 1, 1989)  
 1701(b)(3) --- 90 IBLA 236, 93 I.D. 6 (1986)  
 97 IBLA 387 (May 27, 1987)  
 104 IBLA 173 (Sept. 9, 1988)  
 1702(10) ----- M-36952, 92 I.D. 459 (1985)  
 1702(14) ----- 106 IBLA 104, 95 I.D. 265 (1988)  
 M-36956, 95 I.D. 203 (1988)  
 1709 ----- 89 IBLA 150 (Oct. 4, 1985)  
 91 IBLA 252 (Apr. 9, 1986)  
 1711 ----- 109 IBLA 4 (May 23, 1989)  
 110 IBLA 232 (Aug. 29, 1989)  
 111 IBLA 284 (Oct. 26, 1989)  
 1711(c) ----- 107 IBLA 184 (Feb. 14, 1989)  
 1716(c) ----- 109 IBLA 242 (June 16, 1989)  
 1719 ----- 97 IBLA 387 (May 27, 1987)  
 107 IBLA 332 (Mar. 14, 1989)  
 108 IBLA 62 (Mar. 22, 1989)  
 110 IBLA 127 (Aug. 8, 1989)  
 111 IBLA 284 (Oct. 26, 1989)  
 M-36956, 95 I.D. 203 (1988)  
 1719(a)(1)(B)- 110 IBLA 282, 96 I.D. 367 (1989)  
 1719(a)(2)(B)- 102 IBLA 86 (Apr. 14, 1988)  
 1719(b) ----- 102 IBLA 86 (Apr. 14, 1988)  
 1719(c) ----- 106 IBLA 104, 95 I.D. 265 (1988)  
 110 IBLA 282, 96 I.D. 367 (1989)  
 1719(c)(1) --- 96 IBLA 149, 94 I.D. 69 (1987)  
 1719(e) ----- 110 IBLA 282, 96 I.D. 367 (1989)  
 1719(h) ----- 102 IBLA 86 (Apr. 14, 1988)  
 103 IBLA 75 (June 30, 1988)  
 1719(i) ----- 106 IBLA 104, 95 I.D. 265 (1988)  
 1721 ----- 90 IBLA 236, 93 I.D. 6 (1986)  
 103 IBLA 138 (July 20, 1988)  
 107 IBLA 32 (Jan. 25, 1989)  
 107 IBLA 91 (Feb. 1, 1989)  
 107 IBLA 161 (Feb. 10, 1989)  
 108 IBLA 62 (Mar. 22, 1989)  
 108 IBLA 209 (Apr. 19, 1989)  
 108 IBLA 340 (May 9, 1989)  
 110 IBLA 209 (Aug. 21, 1989)



## TITLE 30: (Cont.)

sec. 1721 ----- 112 IBLA 1 (Nov. 8, 1989)  
                     M-36956, 95 I.D. 203 (1988)  
 1721(a) ----- 104 IBLA 173 (Sept. 9, 1988)  
                     106 IBLA 104, 95 I.D. 265 (1988)  
                     107 IBLA 32 (Jan. 25, 1989)  
                     107 IBLA 91 (Feb. 1, 1989)  
                     107 IBLA 121 (Feb. 2, 1989)  
                     107 IBLA 179 (Feb. 14, 1989)  
                     108 IBLA 62 (Mar. 22, 1989)  
                     108 IBLA 149 (Apr. 5, 1989)  
                     108 IBLA 209 (Apr. 19, 1989)  
                     108 IBLA 340 (May 9, 1989)  
                     111 IBLA 181 (Oct. 6, 1989)  
                     111 IBLA 201 (Oct. 12, 1989)  
                     111 IBLA 377 (Nov. 8, 1989)  
                     112 IBLA 1 (Nov. 8, 1989)  
                     M-36956, 95 I.D. 203 (1988)  
 1721(b) ----- 101 IBLA 152 (Feb. 9, 1988)  
                     M-36956, 95 I.D. 203 (1988)  
 1721(c) ----- M-36956, 95 I.D. 203 (1988)  
 1731 ----- M-36956, 95 I.D. 203 (1988)  
 1734 ----- M-36956, 95 I.D. 203 (1988)  
 1735 ----- 107 IBLA 179 (Feb. 14, 1989)  
 1736 ----- M-36956, 95 I.D. 203 (1988)  
 1753(a) ----- 110 IBLA 216 (Aug. 23, 1989)  
 1755 ----- 110 IBLA 127 (Aug. 8, 1989)  
                     111 IBLA 284 (Oct. 26, 1989)  
 1756 ----- 110 IBLA 216 (Aug. 23, 1989)

## TITLE 31:

sec. 484 ----- M-36956, 95 I.D. 203 (1988)  
 627 ----- M-36956, 95 I.D. 203 (1988)  
 665 ----- IBCA-1834 (Aug. 27, 1986)  
 1301(d) ----- M-36956, 95 I.D. 203 (1988)  
 1344 ----- 110 IBLA 80 (July 26, 1989)  
 3716 ----- 95 IBLA 1, 93 I.D. 460 (1986)  
                     112 IBLA 248 (Dec. 28, 1989)  
                     8 OHA 45 (Apr. 5, 1989)  
                     8 OHA 49 (Apr. 6, 1989)  
 3716(a) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 3716(b) ----- 95 IBLA 1, 93 I.D. 460 (1986)  
 3727 ----- 101 IBLA 215 (Feb. 26, 1988)  
 3302(b) ----- M-36956, 95 I.D. 203 (1988)  
 3901 ----- IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
 3901-3906 ---- IBCA-2589 & 2643, 96 I.D. 400  
                     (1989)  
 3901(a)(5) --- IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
 3903(1)(A) --- IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
 3906 ----- IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
 3906(b)(1)(A)- IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
                     IBCA-2589 & 2643, 96 I.D. 400  
                     (1989)

## TITLE 33:

sec. 1107 ----- M-36952, 92 I.D. 459 (1985)  
 1251-1376 ---- 97 IBLA 285, 94 I.D. 181 (1987)  
 1342 ----- 97 IBLA 285, 94 I.D. 181 (1987)  
 1344 ----- 92 IBLA 290 (June 26, 1986)  
                     110 IBLA 80 (July 26, 1989)  
                     6 OHA 52 (June 28, 1985)  
                     8 OHA 1 (Dec. 20, 1988)

## TITLE 40:

sec. 102(2)(C) --- 108 IBLA 277 (Apr. 26, 1989)  
 258a ----- 105 IBLA 151 (Oct. 27, 1988)  
 276 ----- IBCA-1990, 94 I.D. 21 (1987)

## TITLE 40: (Cont.)

sec. 276a ----- IBCA-1990, 94 I.D. 21 (1987)  
                     IBCA-2351 & 2352, 95 I.D. 35 (1988)  
 759 ----- IBCA-2069 (Feb. 22, 1988)

## TITLE 41:

sec. 327 ----- IBCA-1990, 94 I.D. 21 (1987)  
 351 ----- IBCA-1990, 94 I.D. 21 (1987)  
 351 et seq. - IBCA-1917 (July 24, 1986)  
 357(d) ----- M-36952, 92 I.D. 459 (1985)  
 601 ----- IBCA-1787-3-84, 92 I.D. 53 (1985)  
                     IBCA-1834 (May 8, 1987)  
                     IBCA-1953, 94 I.D. 101 (1987)  
                     IBCA-2144 (Nov. 30, 1987)  
                     IBCA-2351 & 2352, 95 I.D. 35  
                     (1988)  
                     IBCA-2417 & 96 I.D. 148 (1989)  
                     IBCA-2625-F (Apr. 10, 1989)  
 601-603 ----- IBCA-1603-7-82, 93 I.D. 27 (1986)  
 601 et seq. - IBCA-1990, 94 I.D. 21 (1987)  
                     IBCA-2409, 95 I.D. 257 (1988)  
 601-613 ----- IBCA-1612-8-82, 92 I.D. 195  
                     (1985)  
                     IBCA-1669-4-83, 92 I.D. 237  
                     (1985)  
                     IBCA-1844 (Oct. 23, 1985)  
                     IBCA-1909 (Dec. 19, 1985)  
                     IBCA-1968 et al., 92 I.D. 255  
                     (1985)  
                     IBCA-1839, 93 I.D. 131 (1986)  
                     IBCA-2078-F, 93 I.D. 437 (1986)  
                     IBCA-2020 (June 29, 1987)  
                     IBCA-2659-F (Sept. 12, 1989)  
                     IBCA-2589 & 2643, 96 I.D. 400  
                     (1989)  
 602 ----- IBCA-1962 & 1966, 93 I.D. 136  
                     (1986)  
                     IBCA-2417, 96 I.D. 148 (1989)  
 602(a) ----- IBCA-1968 et al., 92 I.D. 255  
                     (1985)  
 602(a)(4) --- IBCA-1612-8-82, 92 I.D. 195  
                     (1985)  
                     IBCA-1844 (Oct. 23, 1985)  
 605 ----- IBCA-1839, 93 I.D. 131 (1986)  
                     IBCA-2409, 95 I.D. 257 (1988)  
 605(a) ----- IBCA-1968 et al., 92 I.D. 255  
                     (1985)  
                     IBCA-1990, 94 I.D. 21 (1987)  
                     IBCA-1419-1-81 et al., 94 I.D. 221  
                     (1987)  
                     IBCA-2069 (Feb. 22, 1988)  
                     IBCA-2589 & 2643, 96 I.D. 400  
                     (1989)  
 605(c) ----- IBCA-2090, 93 I.D. 250 (1986)  
                     IBCA-2269, 94 I.D. 211 (1987)  
 605(c)(1) --- IBCA-1927 et al., 92 I.D. 263  
                     (1985)  
                     IBCA-1566-3-82, 93 I.D. 144 (1986)  
                     IBCA-1839, 93 I.D. 131 (1986)  
                     IBCA-2103 & 2350, 95 I.D. 81  
                     (1988)  
                     IBCA-2365 (May 3, 1988)  
                     IBCA-2589 & 2643, 96 I.D. 400  
                     (1989)  
 606 ----- IBCA-1968 et al., 92 I.D. 255  
                     (1985)  
                     IBCA-2068, 93 I.D. 254 (1986)  
                     IBCA-1419-1-81 et al., 94 I.D. 221  
                     (1987)  
                     IBCA-2360, 94 I.D. 413 (1987)  
 607 ----- IBCA-2360, 94 I.D. 413 (1987)  
 607(d) ----- IBCA-1968 et al., 92 I.D. 255  
                     (1985)  
                     IBCA-2409, 95 I.D. 257 (1988)

## TITLE 41: (Cont.)

sec. 607(g) ----- IBCA-1968 et al., 92 I.D. 255  
 (1985)  
 608 ----- IBCA-2065 (Jan. 10, 1986)  
 IBCA-2513-E (Aug. 16, 1988)  
 609 ----- IBCA-1968 et al., 92 I.D. 255  
 (1985)  
 609(b) ----- IBCA-1968 et al., 92 I.D. 255  
 (1985)  
 610 ----- IBCA-2269, 94 I.D. 211 (1987)  
 611 ----- IBCA-1839, 93 I.D. 131 (1986)  
 IBCA-1838 (June 29, 1987)  
 IBCA-1419-1-81 et al., 94 I.D.  
 221 (1987)  
 IBCA-2269, 94 I.D. 211 (1987)  
 IBCA-2351 & 2352, 95 I.D. 35  
 (1988)  
 IBCA-2589 & 2643, 96 I.D. 400  
 (1989)

## TITLE 42:

sec. 300 et seq.--- 105 IBLA 345 (Nov. 17, 1988)  
 1983 ----- 88 IBLA 224, 92 I.D. 363 (1985)  
 1996 ----- 90 IBLA 221 (Jan. 30, 1986)  
 91 IBLA 172 (Mar. 28, 1986)  
 102 IBLA 200 (May 9, 1988)  
 103 IBLA 228 (July 26, 1988)  
 2000e(i) ----- M-36952, 92 I.D. 459 (1985)  
 2001 ----- M-36960, 96 I.D. 1 (1989)  
 4321 ----- 86 IBLA 296 (May 13, 1985)  
 88 IBLA 133 (Aug. 9, 1985)  
 90 IBLA 221 (Jan. 30, 1986)  
 104 IBLA 141 (Sept. 2, 1988)  
 106 IBLA 46 (Dec. 8, 1988)  
 109 IBLA 160 (June 8, 1989)  
 4321 et seq. - 90 IBLA 360 (Feb. 27, 1986)  
 94 IBLA 269, 93 I.D. 417 (1986)  
 M-36961, 96 I.D. 289 (1989)  
 4321-4334 ---- 111 IBLA 107 (Sept. 28, 1989)  
 4321-4335 ---- 104 IBLA 382 (Oct. 3, 1988)  
 4321-4347 ---- 91 IBLA 172 (Mar. 28, 1986)  
 99 IBLA 364 (Nov. 3, 1987)  
 106 IBLA 304 (Jan. 5, 1989)  
 8 OHA 1 (Dec. 20, 1988)  
 4321-4361 ---- 87 IBLA 1 (May 17, 1985)  
 87 IBLA 271 (June 25, 1985)  
 88 IBLA 7 (June 28, 1985)  
 88 IBLA 201 (Aug. 28, 1985)  
 97 IBLA 314 (May 19, 1987)  
 4321-4370 ---- 105 IBLA 369 (Nov. 28, 1988)  
 109 IBLA 112 (June 7, 1989)  
 4331 ----- 85 IBLA 185 (Feb. 26, 1985)  
 108 IBLA 231 (Apr. 24, 1989)  
 4332 ----- 85 IBLA 389 (Mar. 27, 1985)  
 88 IBLA 133 (Aug. 9, 1985)  
 88 IBLA 210 (Aug. 28, 1985)  
 91 IBLA 124 (Mar. 19, 1986)  
 96 IBLA 19, 94 I.D. 35 (1987)  
 96 IBLA 105, 94 I.D. 56 (1987)  
 98 IBLA 314 (July 30, 1987)  
 101 IBLA 18 (Jan. 25, 1988)  
 101 IBLA 234 (Feb. 29, 1988)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 104 IBLA 76 (Aug. 29, 1988)  
 106 IBLA 83 (Dec. 12, 1988)  
 108 IBLA 166 (Apr. 11, 1989)  
 108 IBLA 381 (May 19, 1989)  
 111 IBLA 122 (Sept. 29, 1989)  
 111 IBLA 207 (Oct. 12, 1989)  
 4332-4361 ---- 109 IBLA 188 (June 12, 1989)  
 4332(2)(A) --- 88 IBLA 133 (Aug. 9, 1985)  
 4332(2)(C) --- 85 IBLA 185 (Feb. 26, 1985)  
 87 IBLA 1 (May 17, 1985)  
 88 IBLA 133 (Aug. 9, 1985)

## TITLE 42: (Cont.)

sec. 4332(2)(C) --- 89 IBLA 1, 92 I.D. 389 (1985)  
 91 IBLA 59 (Feb. 28, 1986)  
 92 IBLA 290 (June 26, 1986)  
 96 IBLA 19, 94 I.D. 35 (1987)  
 98 IBLA 108 (June 15, 1987)  
 101 IBLA 18 (Jan. 25, 1988)  
 102 IBLA 187 (May 5, 1988)  
 104 IBLA 76 (Aug. 29, 1988)  
 104 IBLA 382 (Oct. 3, 1988)  
 107 IBLA 96 (Feb. 1, 1989)  
 108 IBLA 10 (Mar. 20, 1989)  
 108 IBLA 198 (Apr. 17, 1989)  
 109 IBLA 112 (June 7, 1989)  
 110 IBLA 67 (July 20, 1989)  
 M-36961, 96 I.D. 289 (1989)  
 8 OHA 1 (Dec. 20, 1988)  
 4332(2)(C)  
 (iii) ----- 102 IBLA 385 (June 17, 1988)  
 4332(2)(D) --- 102 IBLA 385 (June 17, 1988)  
 4332(2)(E) --- 88 IBLA 210 (Aug. 28, 1985)  
 91 IBLA 364 (Apr. 24, 1986)  
 98 IBLA 108 (June 15, 1987)  
 4332(2)(E) --- 106 IBLA 83 (Dec. 12, 1988)  
 4601 ----- 6 OHA 38 (June 18, 1985)  
 7 OHA 47 (Mar. 18, 1987)  
 8 OHA 103 (Sept. 25, 1989)  
 4601 et seq. - 6 OHA 127 (Feb. 11, 1986)  
 6 OHA 128 (Mar. 24, 1986)  
 6 OHA 228 (Aug. 28, 1986)  
 7 OHA 32 (Dec. 3, 1986)  
 7 OHA 42 (Feb. 2, 1987)  
 7 OHA 112 (Aug. 19, 1987)  
 4601(6) ----- 6 OHA 128 (Mar. 24, 1986)  
 6 OHA 216 (Aug. 18, 1986)  
 6 OHA 228 (Aug. 28, 1986)  
 7 OHA 28 (Nov. 18, 1986)  
 7 OHA 34 (Dec. 17, 1986)  
 4602(a) ----- 6 OHA 228 (Aug. 28, 1986)  
 4622 ----- 6 OHA 1 (Jan. 31, 1985)  
 6 OHA 19 (Feb. 26, 1985)  
 6 OHA 38 (June 18, 1985)  
 6 OHA 124 (Jan. 9, 1986)  
 6 OHA 128 (Mar. 24, 1986)  
 6 OHA 228 (Aug. 28, 1986)  
 7 OHA 28 (Nov. 18, 1986)  
 7 OHA 34 (Dec. 17, 1986)  
 7 OHA 47 (Mar. 18, 1987)  
 7 OHA 104 (Aug. 3, 1987)  
 7 OHA 109 (Aug. 6, 1987)  
 8 OHA 23 (Feb. 28, 1989)  
 8 OHA 94 (Sept. 21, 1989)  
 4622(a) ----- 6 OHA 228 (Aug. 28, 1986)  
 7 OHA 34 (Dec. 17, 1986)  
 7 OHA 58 (Apr. 13, 1987)  
 7 OHA 66 (Apr. 22, 1987)  
 7 OHA 73 (May 5, 1987)  
 7 OHA 75 (May 7, 1987)  
 7 OHA 102 (July 20, 1987)  
 7 OHA 112 (Aug. 19, 1987)  
 7 OHA 151 (Oct. 29, 1987)  
 8 OHA 129 (Dec. 14, 1989)  
 7 OHA 47 (Mar. 18, 1987)  
 4622(a)(1) --- 8 OHA 103 (Sept. 25, 1989)  
 8 OHA 122 (Nov. 29, 1989)  
 4622(b) ----- 7 OHA 112 (Aug. 19, 1987)  
 8 OHA 129 (Dec. 14, 1989)  
 4622(c) ----- 6 OHA 215 (Aug. 11, 1986)  
 7 OHA 151 (Oct. 29, 1987)  
 8 OHA 103 (Sept. 25, 1989)  
 4623 ----- 6 OHA 216 (Aug. 18, 1986)  
 7 OHA 112 (Aug. 19, 1987)  
 7 OHA 163 (Feb. 19, 1988)  
 7 OHA 169 (Mar. 30, 1988)  
 7 OHA 182 (May 23, 1988)  
 8 OHA 40 (Mar. 29, 1989)

## TITLE 42: (Cont.)

sec. 4623(a)(1) --- 7 OHA 182 (May 23, 1988)  
 8 OHA 103 (Sept. 25, 1989)  
 8 OHA 122 (Nov. 29, 1989)  
 8 OHA 129 (Dec. 14, 1989)  
 4623(a)(2) --- 7 OHA 169 (Mar. 30, 1988)  
 4624 --- 8 OHA 94 (Sept. 21, 1989)  
 4624(1) --- 7 OHA 215 (June 30, 1988)  
 4626 --- 7 OHA 215 (June 30, 1988)  
 4623(a)(1) --- 7 OHA 66 (Apr. 22, 1987)  
 4623(a)(1)(C)- 7 OHA 47 (Mar. 18, 1987)  
 7 OHA 112 (Aug. 19, 1987)  
 4623(a)(3) --- 7 OHA 70 (Apr. 28, 1987)  
 4624 --- 7 OHA 28 (Nov. 18, 1986)  
 8 OHA 23 (Feb. 28, 1989)  
 8 OHA 94 (Sept. 21, 1989)  
 4624(1) --- 7 OHA 47 (Mar. 18, 1987)  
 4624(2) --- 7 OHA 47 (Mar. 18, 1987)  
 4633 --- 6 OHA 228 (Aug. 28, 1986)  
 7 OHA 32 (Dec. 3, 1986)  
 7 OHA 47 (Mar. 18, 1987)  
 4651 --- 6 OHA 228 (Aug. 28, 1986)  
 4651(6) --- 7 OHA 66 (Apr. 22, 1987)  
 4652 --- 7 OHA 32 (Dec. 3, 1986)  
 4653 --- 6 OHA 23 (Mar. 25, 1985)  
 6 OHA 79 (Aug. 19, 1985)  
 4653(1) --- 7 OHA 119 (Sept. 15, 1987)  
 7 OHA 224 (July 18, 1988)  
 4653(2) --- 7 OHA 99 (July 1, 1987)  
 4653(3) --- 6 OHA 1 (Jan. 31, 1985)  
 7 OHA 224 (July 18, 1988)  
 8 OHA 89 (Aug. 11, 1989)  
 6202(6) --- M-36952, 92 I.D. 459 (1985)  
 6501 --- 85 IBLA 366 (Mar. 26, 1985)  
 6502 --- 102 IBLA 131 (Apr. 21, 1988)  
 6503(a) --- 85 IBLA 366 (Mar. 26, 1985)  
 6503(c) --- 85 IBLA 366 (Mar. 26, 1985)  
 6508 --- 85 IBLA 366 (Mar. 26, 1985)  
 M-36956, 95 I.D. 203 (1988)  
 6903(15) --- 88 IBLA 224, 92 I.D. 363 (1985)  
 7152 --- M-36958, 96 I.D. 15 (1989)  
 7152(b) --- 109 IBLA 147 (June 8, 1989)  
 7153 --- M-36958, 96 I.D. 15 (1989)  
 7153(a) --- 109 IBLA 147 (June 8, 1989)  
 7156 --- M-36950, 92 I.D. 512 (1985)  
 7172 --- 102 IBLA 175 (May 3, 1988)  
 7604(d) --- 107 IBLA 339, 96 I.D. 83 (1989)  
 9101(b) --- M-36952, 92 I.D. 459 (1985)  
 9601-9657 --- 102 IBLA 155, 95 I.D. 61 (1988)  
 9607(c)(3) --- 106 IBLA 104, 95 I.D. 265 (1988)

## TITLE 43:

sec. 2 --- 102 IBLA 241 (May 19, 1988)  
 105 IBLA 252 (Nov. 4, 1988)  
 M-36963, 96 I.D. 331 (1989)  
 11 --- 85 IBLA 77, 92 I.D. 83 (1985)  
 28(b) --- 94 IBLA 239 (Nov. 12, 1986)  
 31 --- 90 IBLA 135, 92 I.D. 620 (1985)  
 96 IBLA 149, 94 I.D. 69 (1987)  
 100 IBLA 50, 94 I.D. 422 (1987)  
 52 --- M-36963, 96 I.D. 331 (1989)  
 141 --- 86 IBLA 85 (Apr. 11, 1985)  
 88 IBLA 66, 92 I.D. 317 (1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 93 IBLA 346 (Sept. 11, 1986)  
 98 IBLA 241 (July 6, 1987)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 141-142 --- 86 IBLA 170 (Apr. 25, 1985)  
 89 IBLA 189 (Oct. 17, 1985)  
 104 IBLA 93 (Aug. 31, 1988)  
 141-143 --- 99 IBLA 291 (Oct. 26, 1987)  
 142 --- 86 IBLA 170 (Apr. 25, 1985)  
 89 IBLA 189 (Oct. 17, 1985)  
 112 IBLA 225 (Dec. 19, 1989)

## TITLE 43: (Cont.)

sec. 150 --- M-36963, 96 I.D. 331 (1989)  
 154 --- 85 IBLA 23 (Jan. 30, 1985)  
 85 IBLA 131 (Feb. 19, 1985)  
 85 IBLA 241 (Mar. 4, 1985)  
 85 IBLA 243 (Mar. 4, 1985)  
 91 IBLA 391 (Apr. 29, 1986)  
 94 IBLA 1 (Sept. 18, 1986)  
 96 IBLA 379 (Apr. 14, 1987)  
 98 IBLA 100 (June 12, 1987)  
 98 IBLA 149 (June 22, 1987)  
 99 IBLA 297 (Oct. 27, 1987)  
 102 IBLA 169 (May 3, 1988)  
 104 IBLA 154, 95 I.D. 142 (1988)  
 155-158 --- 95 IBLA 52 (Dec. 19, 1986)  
 155(1) --- M-36952, 92 I.D. 459 (1985)  
 156 --- 95 IBLA 52 (Dec. 19, 1986)  
 158 --- 92 IBLA 353 (June 30, 1986)  
 161 --- 95 IBLA 136 (Jan. 12, 1987)  
 97 IBLA 253 (May 13, 1987)  
 100 IBLA 44 (Nov. 20, 1987)  
 103 IBLA 375 (Aug. 15, 1988)  
 108 IBLA 328 (May 1, 1989)  
 161-164 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 162(j)(1) --- 94 IBLA 107 (Oct. 7, 1986)  
 164 --- 89 IBLA 242 (Oct. 29, 1985)  
 173 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 175 --- 87 IBLA 247 (June 20, 1985)  
 182 --- 88 IBLA 360 (Sept. 27, 1985)  
 183 --- 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 184 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 185 --- 96 IBLA 239 (Mar. 24, 1987)  
 89 IBLA 242 (Oct. 29, 1985)  
 189 --- 103 IBLA 375 (Aug. 15, 1988)  
 190 --- 103 IBLA 375 (Aug. 15, 1988)  
 201 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 202 --- 88 IBLA 66, 92 I.D. 317 (1985)  
 203 --- 112 IBLA 115 (Nov. 30, 1989)  
 207 --- 93 IBLA 179 (Aug. 15, 1986)  
 211 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 103 IBLA 375 (Aug. 15, 1988)  
 213 --- 103 IBLA 375 (Aug. 15, 1988)  
 214 --- 103 IBLA 375 (Aug. 15, 1988)  
 226(g) --- 96 IBLA 249 (Mar. 25, 1987)  
 255 --- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 270 --- 89 IBLA 242 (Oct. 29, 1985)  
 270-1 --- 13 IBLA 200 (July 29, 1985)  
 85 IBLA 196 (Feb. 27, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 89 IBLA 251 (Oct. 31, 1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 273 (Feb. 5, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 92 IBLA 174 (June 11, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 95 IBLA 261 (Jan. 27, 1987)  
 96 IBLA 209 (Mar. 19, 1987)



## (B) United States Codes

## TITLE 43: (Cont.)

sec. 270-1 ----- 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 350 (May 26, 1987)  
 102 IBLA 131 (Apr. 21, 1988)  
 102 IBLA 182 (May 5, 1988)  
 103 IBLA 112 (July 19, 1988)  
 104 IBLA 277 (Sept. 13, 1988)  
 107 IBLA 229 (Feb. 21, 1989)  
 110 IBLA 367 (Sept. 14, 1989)  
 111 IBLA 139 (Sept. 29, 1989)  
 270-1-270-3 - 85 IBLA 196 (Feb. 27, 1985)  
 85 IBLA 363 (Mar. 25, 1985)  
 87 IBLA 58 (May 28, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 90 IBLA 273 (Feb. 5, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 91 IBLA 343 (Apr. 21, 1986)  
 92 IBLA 174 (June 11, 1986)  
 92 IBLA 340 (June 30, 1986)  
 94 IBLA 38 (Sept. 25, 1986)  
 95 IBLA 261 (Jan. 27, 1987)  
 96 IBLA 42 (Feb. 27, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 132, 94 I.D. 151 (1987)  
 97 IBLA 261 (May 13, 1987)  
 98 IBLA 203 (June 29, 1987)  
 98 IBLA 241 (July 6, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 101 IBLA 333 (Mar. 23, 1988)  
 103 IBLA 96 (July 12, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 105 IBLA 333 (Nov. 14, 1988)  
 108 IBLA 282 (Apr. 26, 1989)  
 109 IBLA 339 (June 20, 1989)  
 109 IBLA 347 (June 23, 1989)  
 112 IBLA 181 (Dec. 11, 1989)  
 270-2 ----- 93 IBLA 147 (July 30, 1986)  
 93 IBLA 355 (Sept. 15, 1986)  
 270-3 ----- 85 IBLA 196 (Feb. 27, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 273 (Feb. 5, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 92 IBLA 174 (June 11, 1986)  
 94 IBLA 38 (Sept. 25, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 101 IBLA 333 (Mar. 23, 1988)  
 103 IBLA 112 (July 19, 1988)  
 108 IBLA 282 (Apr. 26, 1989)  
 109 IBLA 347 (June 23, 1989)  
 111 IBLA 139 (Sept. 29, 1989)  
 270-4 ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 271-274 ----- 103 IBLA 316 (Aug. 5, 1988)  
 274 ----- 103 IBLA 316 (Aug. 5, 1988)  
 276 ----- 103 IBLA 316 (Aug. 5, 1988)  
 279 ----- 95 IBLA 136 (Jan. 12, 1987)  
 291 ----- 88 IBLA 360 (Sept. 27, 1985)  
 91 IBLA 278, 93 I.D. 179 (1986)  
 95 IBLA 144, 94 I.D. 1 (1987)  
 97 IBLA 63 (Apr. 27, 1987)  
 98 IBLA 325 (July 31, 1987)  
 100 IBLA 44 (Nov. 20, 1987)  
 103 IBLA 375 (Aug. 15, 1988)  
 108 IBLA 224 (Apr. 19, 1989)  
 108 IBLA 231 (Apr. 24, 1989)  
 111 IBLA 392 (Nov. 8, 1989)  
 291-301 ----- 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)

## TITLE 43: (Cont.)

sec. 291-301 ----- 95 IBLA 291 (Jan. 29, 1987)  
 103 IBLA 375 (Aug. 15, 1988)  
 105 IBLA 206 (Nov. 2, 1988)  
 111 IBLA 392 (Nov. 8, 1989)  
 291-302 ----- 86 IBLA 350, 92 I.D. 208 (1985)  
 100 IBLA 7 (Nov. 13, 1987)  
 293 ----- 103 IBLA 375 (Aug. 15, 1988)  
 295 ----- 103 IBLA 375 (Aug. 15, 1988)  
 299 ----- 89 IBLA 281 (Nov. 8, 1985)  
 90 IBLA 293, 93 I.D. 66 (1986)  
 91 IBLA 278, 93 I.D. 179 (1986)  
 94 IBLA 69 (Sept. 29, 1986)  
 95 IBLA 144, 94 I.D. 1 (1987)  
 97 IBLA 63 (Apr. 27, 1987)  
 98 IBLA 325 (July 31, 1987)  
 101 IBLA 91 (Feb. 2, 1988)  
 101 IBLA 110 (Feb. 2, 1988)  
 105 IBLA 206 (Nov. 2, 1988)  
 105 IBLA 211 (Nov. 2, 1988)  
 108 IBLA 231 (Apr. 24, 1989)  
 315 ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 92 IBLA 109, 93 I.D. 211 (1986)  
 92 IBLA 200 (June 12, 1986)  
 96 IBLA 4 (Feb. 26, 1987)  
 97 IBLA 1 (Apr. 16, 1987)  
 98 IBLA 325 (July 31, 1987)  
 100 IBLA 70 (Nov. 30, 1987)  
 103 IBLA 375 (Aug. 15, 1988)  
 108 IBLA 162 (Apr. 11, 1989)  
 108 IBLA 231 (Apr. 24, 1989)  
 315-315m ---- 95 IBLA 291 (Jan. 29, 1987)  
 315-315o-1 -- 98 IBLA 258 (July 7, 1987)  
 315-315r ---- 98 IBLA 128 (June 19, 1987)  
 315-316 ---- 100 IBLA 70 (Nov. 30, 1987)  
 315a ----- 92 IBLA 200 (June 12, 1986)  
 96 IBLA 4 (Feb. 26, 1987)  
 97 IBLA 1 (Apr. 16, 1987)  
 315a-315r --- 92 IBLA 200 (June 12, 1986)  
 96 IBLA 4 (Feb. 26, 1987)  
 97 IBLA 1 (Apr. 16, 1987)  
 315b ----- 88 IBLA 248 (Sept. 4, 1985)  
 99 IBLA 137 (Sept. 25, 1987)  
 315c ----- 92 IBLA 200 (June 12, 1986)  
 101 IBLA 177 (Feb. 17, 1988)  
 315f ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 95 IBLA 239 (Jan. 16, 1987)  
 96 IBLA 256 (Mar. 25, 1987)  
 98 IBLA 128 (June 19, 1987)  
 100 IBLA 70 (Nov. 30, 1987)  
 102 IBLA 175 (May 3, 1988)  
 102 IBLA 215 (May 10, 1988)  
 107 IBLA 204 (Feb. 16, 1989)  
 M-36950, 92 I.D. 512 (1985)  
 315g ----- 90 IBLA 372 (Feb. 27, 1986)  
 94 IBLA 1 (Sept. 18, 1986)  
 97 IBLA 340 (May 21, 1987)  
 100 IBLA 44 (Nov. 20, 1987)  
 100 IBLA 60 (Nov. 24, 1987)  
 315g(d) ----- 89 IBLA 281 (Nov. 8, 1985)  
 100 IBLA 44 (Nov. 20, 1987)  
 315h ----- 93 IBLA 89 (July 22, 1986)  
 98 IBLA 4 (May 29, 1987)  
 98 IBLA 258 (July 7, 1987)  
 315m ----- 92 IBLA 200 (June 12, 1986)  
 93 IBLA 89 (July 22, 1986)  
 316 ----- 96 IBLA 198 (Mar. 19, 1987)  
 316m ----- 100 IBLA 267 (Dec. 15, 1987)  
 321 ----- 87 IBLA 247 (June 20, 1985)  
 87 IBLA 253 (June 20, 1985)  
 89 IBLA 311 (Nov. 12, 1985)  
 89 IBLA 400 (Nov. 22, 1985)  
 95 IBLA 37 (Dec. 15, 1986)  
 96 IBLA 256 (Mar. 25, 1987)  
 97 IBLA 23 (Apr. 23, 1987)



## TITLE 43: (Cont.)

sec. 321 ----- 97 IBLA 105 (Apr. 29, 1987)  
 97 IBLA 250 (May 13, 1987)  
 98 IBLA 69 (June 9, 1987)  
 98 IBLA 128 (June 19, 1987)  
 102 IBLA 175 (May 3, 1988)  
 102 IBLA 215 (May 10, 1988)  
 105 IBLA 324 (Nov. 10, 1988)  
 106 IBLA 327 (Jan. 9, 1989)  
 107 IBLA 193 (Feb. 14, 1989)  
 107 IBLA 204 (Feb. 16, 1989)  
 108 IBLA 88 (Mar. 28, 1989)  
 108 IBLA 155 (Apr. 10, 1989)  
 109 IBLA 226 (June 16, 1989)  
 M-36914 (Supp. III), 96 I.D.  
 211 (1989)  
 321-339 ----- 95 IBLA 37 (Dec. 15, 1986)  
 107 IBLA 193 (Feb. 14, 1989)  
 107 IBLA 204 (Feb. 16, 1989)  
 324 ----- 107 IBLA 204 (Feb. 16, 1989)  
 326 ----- 96 IBLA 256 (Mar. 25, 1987)  
 327 ----- 98 IBLA 69 (June 9, 1987)  
 328 ----- 97 IBLA 250 (May 13, 1987)  
 329 ----- 91 IBLA 370 (Apr. 28, 1986)  
 105 IBLA 353 (Nov. 21, 1988)  
 108 IBLA 392 (May 22, 1989)  
 333 ----- 91 IBLA 370 (Apr. 28, 1986)  
 94 IBLA 59 (Sept. 26, 1986)  
 108 IBLA 88 (Mar. 28, 1989)  
 108 IBLA 392 (May 22, 1989)  
 334 ----- 108 IBLA 392 (May 22, 1989)  
 336 ----- 108 IBLA 392 (May 22, 1989)  
 336(c) ----- 107 IBLA 204 (Feb. 16, 1989)  
 351 et seq. - 96 IBLA 256 (Mar. 25, 1987)  
 355a-355e --- 14 IBLA 260 (Sept. 10, 1986)  
 371-498 ----- 100 IBLA 94, 94 I.D. 429 (1987)  
 387(b) ----- 8 OHA 1 (Dec. 20, 1988)  
 390aa et seq. M-36959, 96 I.D. 199 (1989)  
 390cc ----- M-36959, 96 I.D. 199 (1989)  
 M-36961, 96 I.D. 289 (1989)  
 390cc(a) ----- M-36959, 96 I.D. 199 (1989)  
 390cc(a)(1) - M-36959, 96 I.D. 199 (1989)  
 390cc(a)(2) - M-36959, 96 I.D. 199 (1989)  
 390dd ----- M-36959, 96 I.D. 199 (1989)  
 390hh ----- M-36959, 96 I.D. 199 (1989)  
 390ww(c) ----- M-36959, 96 I.D. 199 (1989)  
 391 ----- 93 IBLA 317, 93 I.D. 394 (1986)  
 416 ----- 85 IBLA 243 (Mar. 4, 1985)  
 87 IBLA 266 (June 25, 1985)  
 98 IBLA 251 (July 7, 1987)  
 99 IBLA 16 (Aug. 14, 1987)  
 107 IBLA 118 (Feb. 2, 1989)  
 107 IBLA 140 (Feb. 6, 1989)  
 112 IBLA 228 (Dec. 19, 1989)  
 421 ----- 98 IBLA 251 (July 7, 1987)  
 431 ----- M-36959, 96 I.D. 199 (1989)  
 441 ----- 90 IBLA 310 (Feb. 24, 1986)  
 485h(c) ----- M-36961, 96 I.D. 289 (1989)  
 485h(e) ----- M-36961, 96 I.D. 289 (1989)  
 485h-1 ----- M-36961, 96 I.D. 289 (1989)  
 485h-1-h-5 -- M-36961, 96 I.D. 289 (1989)  
 485h-1(2) --- M-36961, 96 I.D. 289 (1989)  
 485h-1(4) --- M-36961, 96 I.D. 289 (1989)  
 485h-2 ----- M-36961, 96 I.D. 289 (1989)  
 544 ----- 101 IBLA 272 (Mar. 10, 1988)  
 620 ----- 95 IBLA 69 (Dec. 22, 1986)  
 641-648 ----- 95 IBLA 37 (Dec. 15, 1986)  
 661 ----- 93 IBLA 1, 93 I.D. 288 (1986)  
 96 IBLA 193 (Mar. 19, 1987)  
 666 ----- M-36914 (Supp. III), 96 I.D.  
 211 (1989)  
 670h(c)(4) -- M-36963, 96 I.D. 331 (1989)  
 676 ----- 88 IBLA 360 (Sept. 27, 1985)  
 678 ----- 88 IBLA 360 (Sept. 27, 1985)

## TITLE 43: (Cont.)

sec. 682a ----- 89 IBLA 251 (Oct. 31, 1985)  
 89 IBLA 369, 92 I.D. 606 (1985)  
 92 IBLA 9 (Apr. 30, 1986)  
 95 IBLA 291 (Jan. 29, 1987)  
 99 IBLA 174 (Oct. 2, 1987)  
 101 IBLA 33 (Jan. 25, 1988)  
 108 IBLA 130 (Apr. 3, 1989)  
 109 IBLA 100 (June 5, 1989)  
 682a-682e --- 92 IBLA 9 (Apr. 30, 1986)  
 104 IBLA 93 (Aug. 31, 1988)  
 682b ----- 111 IBLA 217, 96 I.D. 452 (1989)  
 687a ----- 85 IBLA 74 (Feb. 11, 1985)  
 85 IBLA 140 (Feb. 20, 1985)  
 98 IBLA 391 (Aug. 5, 1987)  
 100 IBLA 1 (Nov. 12, 1987)  
 103 IBLA 104 (July 13, 1988)  
 106 IBLA 294 (Jan. 5, 1989)  
 107 IBLA 229 (Feb. 21, 1989)  
 111 IBLA 77 (Sept. 26, 1989)  
 687a-1 ----- 85 IBLA 74 (Feb. 11, 1985)  
 85 IBLA 140 (Feb. 20, 1985)  
 100 IBLA 1 (Nov. 12, 1987)  
 111 IBLA 77 (Sept. 26, 1989)  
 687b-687b-5 - 89 IBLA 369, 92 I.D. 606 (1985)  
 718 ----- 94 IBLA 107 (Oct. 7, 1986)  
 732 ----- 94 IBLA 107 (Oct. 7, 1986)  
 95 IBLA 20 (Dec. 12, 1986)  
 733-736 ----- 94 IBLA 107 (Oct. 7, 1986)  
 735 ----- 95 IBLA 20 (Dec. 12, 1986)  
 751 ----- 98 IBLA 363 (July 31, 1987)  
 751-774 ----- 102 IBLA 241 (May 19, 1988)  
 772 ----- 87 IBLA 380 (June 28, 1985)  
 92 IBLA 162 (June 6, 1986)  
 94 IBLA 162 (Oct. 28, 1986)  
 94 IBLA 220 (Nov. 10, 1986)  
 104 IBLA 377 (Sept. 27, 1988)  
 110 IBLA 271 (Sept. 13, 1989)  
 851 ----- 88 IBLA 382 (Sept. 27, 1985)  
 98 IBLA 363 (July 31, 1987)  
 109 IBLA 274 (June 20, 1989)  
 M-36950, 92 I.D. 512 (1985)  
 852 ----- 88 IBLA 382 (Sept. 27, 1985)  
 98 IBLA 363 (July 31, 1987)  
 M-36950, 92 I.D. 512 (1985)  
 852(a)(1) --- M-36950, 92 I.D. 512 (1985)  
 852(a)(2) --- M-36950, 92 I.D. 512 (1985)  
 852(a)(3) --- M-36950, 92 I.D. 512 (1985)  
 852(a)(4) --- M-26956, 95 I.D. 203 (1988)  
 869 ----- 85 IBLA 140 (Feb. 20, 1985)  
 87 IBLA 81 (May 29, 1985)  
 90 IBLA 255 (Jan. 31, 1986)  
 94 IBLA 173 (Oct. 29, 1986)  
 97 IBLA 1 (Apr. 16, 1987)  
 102 IBLA 155, 95 I.D. 61 (1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 106 IBLA 26 (Dec. 7, 1988)  
 106 IBLA 160, 95 I.D. 304 (1988)  
 869-869-4 --- 87 IBLA 323 (June 26, 1985)  
 100 IBLA 60 (Nov. 24, 1987)  
 102 IBLA 155, 95 I.D. 61 (1988)  
 104 IBLA 382 (Oct. 3, 1988)  
 104 IBLA 389 (Oct. 3, 1988)  
 869(c) ----- 104 IBLA 389 (Oct. 3, 1988)  
 869-1 ----- 87 IBLA 323 (June 26, 1985)  
 102 IBLA 155, 95 I.D. 61 (1988)  
 106 IBLA 317 (Jan. 6, 1989)  
 869-1(4) --- 104 IBLA 389 (Oct. 3, 1988)  
 869-2 ----- 97 IBLA 1 (Apr. 16, 1987)  
 870 ----- 101 IBLA 340, 95 I.D. 49 (1988)  
 870-871 ----- 98 IBLA 358 (July 31, 1987)  
 870(c) ----- M-36950, 92 I.D. 512 (1985)  
 871a ----- 98 IBLA 363 (July 31, 1987)  
 101 IBLA 340, 95 I.D. 49 (1988)

## TITLE 43: (Cont.)

sec. 872 ----- 86 IBLA 149 (Apr. 25, 1985)  
 912 ----- M-36964, 96 I.D. 439 (1989)  
 916 ----- 110 IBLA 224 (Aug. 24, 1989)  
 931 ----- 111 IBLA 69 (Sept. 22, 1989)  
 932 ----- 88 IBLA 31 (July 9, 1985)  
           88 IBLA 106 (July 23, 1985)  
           89 IBLA 120 (Sept. 30, 1985)  
           89 IBLA 323, 92 I.D. 578 (1985)  
           90 IBLA 14 (Dec. 4, 1985)  
           90 IBLA 168 (Jan. 8, 1986)  
           90 IBLA 273 (Feb. 5, 1986)  
           98 IBLA 203 (June 29, 1987)  
           98 IBLA 237 (July 6, 1987)  
           98 IBLA 378 (Aug. 4, 1987)  
           100 IBLA 257 (Dec. 9, 1987)  
           104 IBLA 17 (Aug. 17, 1988)  
           104 IBLA 377 (Sept. 27, 1988)  
           106 IBLA 1 (Nov. 30, 1988)  
           108 IBLA 381 (May 19, 1989)  
           111 IBLA 122 (Sept. 29, 1989)  
           111 IBLA 207 (Oct. 12, 1989)  
 934 ----- 85 IBLA 66 (Feb. 11, 1985)  
           M-36964, 96 I.D. 439 (1989)  
 934-939 ----- M-36964, 96 I.D. 439 (1989)  
 937 ----- 87 IBLA 236 (June 19, 1985)  
           M-36964, 96 I.D. 439 (1989)  
 945 ----- 93 IBLA 221 (Aug. 20, 1986)  
           112 IBLA 228 (Dec. 19, 1989)  
 946 ----- 87 IBLA 236 (June 19, 1985)  
 946-948 ----- 87 IBLA 236 (June 19, 1985)  
 946-949 ----- 87 IBLA 236 (June 19, 1985)  
 948 ----- 87 IBLA 236 (June 19, 1985)  
 959 ----- 85 IBLA 389 (Mar. 27, 1985)  
           87 IBLA 236 (June 19, 1985)  
 961 ----- 106 IBLA 346 (Jan. 12, 1989)  
           85 IBLA 363 (Mar. 25, 1985)  
           90 IBLA 168 (Jan. 8, 1986)  
           90 IBLA 273 (Feb. 5, 1986)  
           94 IBLA 261 (Nov. 17, 1986)  
           98 IBLA 203 (June 29, 1987)  
           100 IBLA 318 (Dec. 31, 1987)  
           104 IBLA 66 (Aug. 25, 1988)  
           106 IBLA 379 (Jan. 19, 1989)  
           107 IBLA 82 (Jan. 31, 1989)  
           109 IBLA 142 (June 8, 1989)  
           111 IBLA 69 (Sept. 22, 1989)  
 971a ----- 89 IBLA 369, 92 I.D. 606 (1985)  
           92 IBLA 316 (June 26, 1986)  
           92 IBLA 318 (June 26, 1986)  
 971a-971e --- 89 IBLA 369, 92 I.D. 606 (1985)  
           92 IBLA 318 (June 26, 1986)  
           95 IBLA 261 (Jan. 27, 1987)  
 971b ----- 89 IBLA 369, 92 I.D. 606 (1985)  
           92 IBLA 316 (June 26, 1986)  
           92 IBLA 318 (June 26, 1986)  
 981-986 ----- 87 IBLA 121 (Apr. 30, 1987)  
 982-984 ----- 86 IBLA 254 (May 3, 1985)  
 1061 ----- 101 IBLA 177 (Feb. 17, 1988)  
 1063 ----- 101 IBLA 177 (Feb. 17, 1988)  
 1068 ----- 85 IBLA 93 (Feb. 14, 1985)  
           85 IBLA 108 (Feb. 14, 1985)  
           86 IBLA 41 (Apr. 9, 1985)  
           86 IBLA 254 (May 3, 1985)  
           87 IBLA 34 (May 23, 1985)  
           87 IBLA 118 (May 31, 1985)  
           89 IBLA 281 (Nov. 8, 1985)  
           90 IBLA 323 (Feb. 25, 1986)  
           90 IBLA 330 (Feb. 26, 1986)  
           93 IBLA 119 (July 28, 1986)  
           93 IBLA 211 (Aug. 20, 1986)  
           94 IBLA 1 (Sept. 18, 1986)  
           94 IBLA 220 (Nov. 10, 1986)  
           94 IBLA 392 (Dec. 9, 1986)

## TITLE 43: (Cont.)

sec. 1068 ----- 95 IBLA 291 (Jan. 29, 1987)  
           95 IBLA 343 (Feb. 4, 1987)  
           95 IBLA 352 (Feb. 11, 1987)  
           96 IBLA 209 (Mar. 19, 1987)  
           97 IBLA 108 (Apr. 29, 1987)  
           97 IBLA 121 (Apr. 30, 1987)  
           97 IBLA 126 (Apr. 30, 1987)  
           98 IBLA 153 (June 23, 1987)  
           99 IBLA 217 (Oct. 15, 1987)  
           100 IBLA 89 (Nov. 30, 1987)  
           101 IBLA 187 (Feb. 17, 1988)  
           102 IBLA 241 (May 19, 1988)  
           103 IBLA 302 (Aug. 4, 1988)  
           108 IBLA 296 (Apr. 27, 1989)  
           109 IBLA 100 (June 5, 1989)  
           111 IBLA 344 (Nov. 2, 1989)  
           111 IBLA 364 (Nov. 3, 1989)  
           112 IBLA 148 (Dec. 7, 1989)  
 1068-1068b --- 93 IBLA 211 (Aug. 20, 1986)  
           102 IBLA 241 (May 19, 1988)  
 1068a ----- 87 IBLA 34 (May 23, 1985)  
           93 IBLA 119 (July 28, 1986)  
           94 IBLA 220 (Nov. 10, 1986)  
           97 IBLA 108 (Apr. 29, 1987)  
           97 IBLA 121 (Apr. 30, 1987)  
           99 IBLA 217 (Oct. 15, 1987)  
           100 IBLA 89 (Nov. 30, 1987)  
           103 IBLA 302 (Aug. 4, 1988)  
 1068b ----- 89 IBLA 279 (Nov. 8, 1985)  
           94 IBLA 220 (Nov. 10, 1986)  
           95 IBLA 343 (Feb. 4, 1987)  
           97 IBLA 121 (Apr. 30, 1987)  
           99 IBLA 217 (Oct. 15, 1987)  
 1139(a) ----- 112 IBLA 174 (Dec. 11, 1989)  
 1161 ----- 108 IBLA 155 (Apr. 10, 1989)  
           110 IBLA 1 (July 5, 1989)  
 1164 ----- 110 IBLA 1 (July 5, 1989)  
 1165 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
           95 IBLA 271 (Jan. 29, 1987)  
           106 IBLA 30, 95 I.D. 314 (1988)  
 1166 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
           90 IBLA 23, 92 I.D. 613 (1985)  
           90 IBLA 179 (Jan. 22, 1986)  
           102 IBLA 256, 95 I.D. 64 (1988)  
           106 IBLA 230, 95 I.D. 314 (1988)  
           110 IBLA 224 (Aug. 24, 1989)  
 1171 ----- 87 IBLA 81 (May 29, 1985)  
           89 IBLA 369, 92 I.D. 606 (1985)  
           91 IBLA 108 (Mar. 14, 1986)  
           97 IBLA 330 (May 21, 1987)  
 1171(a) ----- 102 IBLA 385 (June 17, 1988)  
 1181a ----- 92 IBLA 364 (Apr. 24, 1986)  
           98 IBLA 108 (June 15, 1987)  
           104 IBLA 382 (Oct. 3, 1988)  
 1181a-1181f -- 86 IBLA 296 (May 13, 1985)  
           97 IBLA 8 (Apr. 20, 1987)  
           101 IBLA 234 (Feb. 29, 1988)  
           109 IBLA 188 (June 12, 1989)  
 1181c ----- 103 IBLA 375 (Aug. 15, 1988)  
 1185 ----- 112 IBLA 51 (Nov. 20, 1989)  
 1201 ----- 105 IBLA 252 (Nov. 4, 1988)  
 1221 ----- 86 IBLA 254 (May 3, 1985)  
           101 IBLA 187 (Feb. 17, 1988)  
 1272(e)(1) --- 98 IBLA 306 (July 30, 1987)  
 1276(a)(1) --- 102 IBLA 111 (Apr. 20, 1988)  
 1301 ----- 90 IBLA 135, 92 I.D. 620 (1985)  
           100 IBLA 50, 94 I.D. 422 (1987)  
           102 IBLA 357 (June 10, 1988)  
           103 IBLA 278 (Aug. 3, 1988)  
 1301 et seq. - 85 IBLA 311 (Mar. 21, 1985)  
           86 IBLA 325 (May 16, 1985)  
           M-36952, 92 I.D. 459 (1985)  
 1301(a) ----- M-36952, 92 I.D. 459 (1985)  
 1301(a)(1) --- M-36952, 92 I.D. 459 (1985)

## TITLE 43: (Cont.)

sec. 1301(a)(2) --- M-36952, 92 I.D. 459 (1985)  
 1301(g) ----- M-36952, 92 I.D. 459 (1985)  
 1311 ----- 102 IBLA 357 (June 10, 1988)  
 1311-1315 ---- 90 IBLA 135, 92 I.D. 620 (1985)  
                   100 IBLA 50, 94 I.D. 422 (1987)  
 1312 ----- M-36956, 95 I.D. 203 (1988)  
 1313 ----- 102 IBLA 357 (June 10, 1988)  
 1330 ----- 107 IBLA 121 (Feb. 2, 1989)  
                   107 IBLA 184 (Feb. 14, 1989)  
                   110 IBLA 62 (July 20, 1989)  
                   111 IBLA 92 (Sept. 26, 1989)  
                   M-36956, 95 I.D. 203 (1988)  
 1331 ----- 110 IBLA 216 (Aug. 23, 1989)  
                   110 IBLA 282, 96 I.D. 367 (1989)  
 1331-1340 ---- 92 IBLA 200 (June 12, 1986)  
 1331-1356 ---- 91 IBLA 1, 93 I.D. 95 (1986)  
                   96 IBLA 149, 94 I.D. 69 (1987)  
                   104 IBLA 304 (Sept. 15, 1988)  
                   107 IBLA 165 (Feb. 13, 1989)  
                   109 IBLA 34 (May 25, 1989)  
                   110 IBLA 62 (July 20, 1989)  
                   110 IBLA 232 (Aug. 29, 1989)  
                   111 IBLA 201 (Oct. 12, 1989)  
                   111 IBLA 260 (Oct. 25, 1989)  
                   112 IBLA 198 (Dec. 13, 1989)  
 1331 et seq. - M-36952, 92 I.D. 459 (1985)  
 1331(a) ----- M-36952, 92 I.D. 459 (1985)  
 1331(m) ----- 110 IBLA 216 (Aug. 23, 1989)  
 1332(3) ----- 109 IBLA 147 (June 8, 1989)  
 1332(6) ----- 110 IBLA 216 (Aug. 23, 1989)  
 1333(a)(2)(A)- 91 IBLA 1, 93 I.D. 95 (1986)  
                   112 IBLA 77 (Nov. 22, 1989)  
 1333(a)(2)(B)- M-36952, 92 I.D. 459 (1985)  
 1334 ----- 103 IBLA 296 (Aug. 3, 1988)  
                   105 IBLA 97 (Oct. 24, 1988)  
                   107 IBLA 165 (Feb. 13, 1989)  
                   110 IBLA 282, 96 I.D. 367 (1989)  
 1334(a) ----- 96 IBLA 149, 94 I.D. 69 (1987)  
                   103 IBLA 108 (July 19, 1988)  
                   109 IBLA 147 (June 8, 1989)  
                   110 IBLA 216 (Aug. 23, 1989)  
                   111 IBLA 96 (Sept. 28, 1989)  
 1334(a)(2) --- 110 IBLA 282, 96 I.D. 367 (1989)  
 1334(b)(1) --- 110 IBLA 282, 96 I.D. 367 (1989)  
 1334(b)(2) --- 110 IBLA 282, 96 I.D. 367 (1989)  
 1334(d) ----- 107 IBLA 184 (Feb. 14, 1989)  
 1335 ----- 105 IBLA 97 (Oct. 24, 1988)  
 1335(a)(8) --- 105 IBLA 97 (Oct. 24, 1988)  
 1335(a)(9) --- 109 IBLA 147 (June 8, 1989)  
 1335(b) ----- 105 IBLA 97 (Oct. 24, 1988)  
 1336 ----- 96 IBLA 244 (Mar. 24, 1987)  
 1337 ----- 96 IBLA 244 (Mar. 24, 1987)  
                   98 IBLA 218, 94 I.D. 329 (1987)  
                   103 IBLA 108 (July 19, 1988)  
                   104 IBLA 178 (Sept. 9, 1988)  
                   109 IBLA 89 (May 31, 1989)  
                   111 IBLA 260 (Oct. 25, 1989)  
 1337(a) ----- 96 IBLA 384 (Apr. 14, 1987)  
                   108 IBLA 358 (May 15, 1989)  
 1337(a)(1) --- 110 IBLA 216 (Aug. 23, 1989)  
 1337(a)(1)(A)- 98 IBLA 218, 94 I.D. 329 (1987)  
 1337(b) ----- 85 IBLA 121 (Feb. 15, 1985)  
 1337(g) ----- M-36956, 95 I.D. 203 (1988)  
 1337(g)(2) --- M-36956, 95 I.D. 203 (1988)  
 1337(g)(4) --- M-36956, 95 I.D. 203 (1988)  
 1338 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
                   106 IBLA 300 (Jan. 5, 1989)  
 1339 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
                   96 IBLA 384 (Apr. 14, 1987)  
                   103 IBLA 338 (Aug. 9, 1988)  
                   104 IBLA 178 (Sept. 9, 1988)  
                   105 IBLA 97 (Oct. 24, 1988)

## TITLE 43: (Cont.)

sec. 1339 ----- 105 IBLA 314 (Nov. 10, 1988)  
                   105 IBLA 357 (Nov. 22, 1988)  
                   106 IBLA 300 (Jan. 5, 1989)  
                   106 IBLA 333 (Jan. 10, 1989)  
                   107 IBLA 32 (Jan. 25, 1989)  
 1339(a) ----- 96 IBLA 149, 94 I.D. 69 (1987)  
                   104 IBLA 399 (Oct. 6, 1988)  
                   105 IBLA 21 (Oct. 12, 1988)  
                   105 IBLA 97 (Oct. 24, 1988)  
                   106 IBLA 333 (Jan. 10, 1989)  
                   107 IBLA 121 (Feb. 2, 1989)  
                   107 IBLA 165 (Feb. 13, 1989)  
                   110 IBLA 62 (July 20, 1989)  
                   111 IBLA 92 (Sept. 26, 1989)  
                   M-36956, 95 I.D. 203 (1988)  
 1339(b) ----- 106 IBLA 333 (Jan. 10, 1989)  
 1344(a) ----- M-36954, 93 I.D. 125 (1986)  
 1344(a)(4) --- 104 IBLA 304 (Sept. 15, 1988)  
                   112 IBLA 56 (Nov. 21, 1989)  
 1344(d)(3) --- M-36954, 93 I.D. 125 (1986)  
 1350 ----- 107 IBLA 332 (Mar. 14, 1989)  
                   110 IBLA 282, 96 I.D. 367 (1989)  
 1350(b) ----- 90 IBLA 236, 93 I.D. 6 (1986)  
                   M-36956, 95 I.D. 203 (1988)  
 1350(c) ----- 96 IBLA 149, 94 I.D. 69 (1987)  
 1352 ----- 96 IBLA 244 (Mar. 24, 1987)  
 1353 ----- 109 IBLA 147 (June 8, 1989)  
 1374 ----- 96 IBLA 149, 94 I.D. 69 (1987)  
 1411 ----- 92 IBLA 200 (June 12, 1986)  
 1411-1418 --- 94 IBLA 38 (Sept. 25, 1986)  
                   106 IBLA 198 (Dec. 21, 1988)  
 1431-1435 --- 102 IBLA 241 (May 19, 1988)  
 1432 ----- 108 IBLA 130 (Apr. 3, 1989)  
 1453 ----- M-36960, 96 I.D. 1 (1989)  
 1453(a) ----- M-36960, 96 I.D. 1 (1989)  
 1464 ----- 85 IBLA 250 (Mar. 6, 1985)  
 1501 et seq. - IBCA-1789, 96 I.D. 487 (1989)  
 1571 ----- 95 IBLA 239 (Jan. 16, 1987)  
 1571-1599 --- 95 IBLA 239 (Jan. 16, 1987)  
                   98 IBLA 251 (July 7, 1987)  
 1601 ----- 85 IBLA 74 (Feb. 11, 1985)  
                   85 IBLA 165 (Feb. 25, 1985)  
                   85 IBLA 311 (Mar. 21, 1985)  
                   85 IBLA 366 (Mar. 26, 1985)  
                   86 IBLA 268 (May 10, 1985)  
                   86 IBLA 325 (May 16, 1985)  
                   87 IBLA 313 (June 25, 1985)  
                   88 IBLA 336 (Sept. 19, 1985)  
                   90 IBLA 54 (Dec. 10, 1985)  
                   90 IBLA 265 (Jan. 31, 1986)  
                   93 IBLA 250 (Aug. 26, 1986)  
                   94 IBLA 107 (Oct. 7, 1986)  
                   96 IBLA 368 (Apr. 10, 1987)  
                   100 IBLA 50, 94 I.D. 422 (1987)  
                   105 IBLA 380 (Nov. 29, 1988)  
                   107 IBLA 266 (Feb. 23, 1989)  
                   109 IBLA 128 (June 8, 1989)  
 1601-1624 --- 90 IBLA 265 (Jan. 31, 1986)  
                   97 IBLA 132, 94 I.D. 151 (1987)  
 1601-1627 --- 85 IBLA 311 (Mar. 21, 1985)  
                   86 IBLA 340 (May 16, 1985)  
                   87 IBLA 67 (May 28, 1985)  
                   87 IBLA 283 (June 25, 1985)  
                   91 IBLA 86 (Mar. 11, 1986)  
 1601-1628 --- 88 IBLA 349 (Sept. 24, 1985)  
                   89 IBLA 251 (Oct. 31, 1985)  
                   95 IBLA 225 (Jan. 16, 1987)  
                   99 IBLA 201 (Oct. 13, 1987)  
                   6 OHA 52 (June 28, 1985)  
 1601-1629a --- 15 IBIA 135 (Mar. 20, 1987)  
                   95 IBLA 20 (Dec. 12, 1986)  
                   101 IBLA 375 (Mar. 30, 1988)  
                   103 IBLA 138 (July 20, 1988)



## TITLE 43: (Cont.)

sec. 1601-1638 ----- 106 IBLA 160, 95 I.D. 304 (1988)  
 1601(a) ----- 86 IBLA 340 (May 16, 1985)  
 87 IBLA 67 (May 28, 1985)  
 87 IBLA 283 (June 25, 1985)  
 106 IBLA 160, 95 I.D. 304 (1988)  
 1601(b) ----- 93 IBLA 369 (Sept. 17, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 97 IBLA 367 (May 27, 1987)  
 1602(c) ----- 86 IBLA 340 (May 16, 1985)  
 87 IBLA 67 (May 28, 1985)  
 87 IBLA 283 (June 25, 1985)  
 1602(d) ----- 86 IBLA 340 (May 16, 1985)  
 87 IBLA 67 (May 28, 1985)  
 87 IBLA 283 (June 25, 1985)  
 93 IBLA 169 (Aug. 15, 1986)  
 1602(e) ----- 85 IBLA 165 (Feb. 25, 1985)  
 87 IBLA 313 (June 25, 1985)  
 93 IBLA 190 (Aug. 15, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 95 IBLA 177 (Jan. 13, 1987)  
 97 IBLA 235 (May 12, 1987)  
 98 IBLA 177 (June 24, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 101 IBLA 298 (Mar. 16, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 105 IBLA 380 (Nov. 29, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1602(e)(1) --- 93 IBLA 190 (Aug. 15, 1986)  
 1603 ----- 90 IBLA 163 (Jan. 8, 1986)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1603-1627 --- 106 IBLA 230, 95 I.D. 314 (1988)  
 1603(a) ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 1603(c) ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 1606 ----- 90 IBLA 54 (Dec. 10, 1985)  
 90 IBLA 135, 92 I.D. 620 (1985)  
 1606(a) ----- 91 IBLA 317 (Apr. 15, 1986)  
 1606(i) ----- 94 IBLA 78 (Sept. 30, 1986)  
 106 IBLA 104, 95 I.D. 265 (1988)  
 1607 ----- 98 IBLA 177 (June 24, 1987)  
 1607(a) ----- 98 IBLA 177 (June 24, 1987)  
 1610 ----- 87 IBLA 96 (May 30, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 91 IBLA 317 (Apr. 15, 1986)  
 95 IBLA 328 (Jan. 30, 1987)  
 98 IBLA 177 (June 24, 1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 101 IBLA 158 (Feb. 10, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1610(a) ----- 90 IBLA 54 (Dec. 10, 1985)  
 91 IBLA 86 (Mar. 11, 1986)  
 91 IBLA 317 (Apr. 15, 1986)  
 93 IBLA 190 (Aug. 15, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 96 IBLA 368 (Apr. 10, 1987)  
 97 IBLA 235 (May 12, 1987)  
 97 IBLA 367 (May 27, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 101 IBLA 298 (Mar. 16, 1988)  
 1610(a)(1) --- 85 IBLA 366 (Mar. 26, 1985)  
 91 IBLA 86 (Mar. 11, 1986)  
 94 IBLA 107 (Oct. 7, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 101 IBLA 158 (Feb. 10, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 106 IBLA 26 (Dec. 7, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1610(a)(1)(A)- 92 IBLA 101 (May 30, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 1610(a)(3) --- 90 IBLA 135, 92 I.D. 620 (1985)  
 1610(a)(3)(A)- 101 IBLA 158 (Feb. 10, 1988)  
 1610(b)(1) --- 98 IBLA 177 (June 24, 1987)

## TITLE 43: (Cont.)

sec. 1610(b)(2) --- 98 IBLA 177 (June 24, 1987)  
 1610(b)(2)(B)- 98 IBLA 177 (June 24, 1987)  
 1610(b)(3)(B)- 98 IBLA 177 (June 24, 1987)  
 1611 ----- 85 IBLA 311 (Mar. 21, 1985)  
 87 IBLA 313 (June 25, 1985)  
 88 IBLA 106 (July 23, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 90 IBLA 54 (Dec. 10, 1985)  
 90 IBLA 135, 92 I.D. 620 (1985)  
 90 IBLA 163 (Jan. 8, 1986)  
 91 IBLA 317 (Apr. 15, 1986)  
 92 IBLA 358 (June 30, 1986)  
 95 IBLA 216 (Jan. 14, 1987)  
 95 IBLA 328 (Jan. 30, 1987)  
 96 IBLA 42 (Feb. 27, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 101 IBLA 158 (Feb. 10, 1988)  
 101 IBLA 298 (Mar. 16, 1988)  
 102 IBLA 363 (June 10, 1988)  
 106 IBLA 26 (Dec. 7, 1988)  
 106 IBLA 160, 95 I.D. 304 (1988)  
 1611(a) ----- 86 IBLA 263 (May 10, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 91 IBLA 86 (Mar. 11, 1986)  
 93 IBLA 190 (Aug. 15, 1986)  
 94 IBLA 107 (Oct. 7, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 95 IBLA 177 (Jan. 13, 1987)  
 98 IBLA 88 (June 10, 1987)  
 101 IBLA 298 (Mar. 16, 1988)  
 102 IBLA 200 (May 9, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 105 IBLA 380 (Nov. 29, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1611(a)(1) --- 89 IBLA 285, 92 I.D. 564 (1985)  
 90 IBLA 54 (Dec. 10, 1985)  
 90 IBLA 87 (Dec. 23, 1985)  
 91 IBLA 317 (Apr. 15, 1986)  
 92 IBLA 358 (June 30, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 107 IBLA 266 (Feb. 23, 1989)  
 1611(b) ----- 105 IBLA 380 (Nov. 29, 1988)  
 1611(c) ----- 89 IBLA 285, 92 I.D. 564 (1985)  
 90 IBLA 135, 92 I.D. 620 (1985)  
 99 IBLA 25 (Aug. 26, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 101 IBLA 375 (Mar. 30, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 1611(c)(3) --- 89 IBLA 285, 93 I.D. 564 (1985)  
 90 IBLA 54 (Dec. 10, 1985)  
 90 IBLA 87 (Dec. 23, 1985)  
 91 IBLA 317 (Apr. 15, 1986)  
 92 IBLA 358 (June 30, 1986)  
 1613 ----- 86 IBLA 268 (May 10, 1985)  
 87 IBLA 96 (May 30, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 90 IBLA 54 (Dec. 10, 1985)  
 91 IBLA 317 (Apr. 15, 1986)  
 92 IBLA 358 (June 30, 1986)  
 95 IBLA 328 (Jan. 30, 1987)  
 96 IBLA 368 (Apr. 10, 1987)  
 98 IBLA 177 (June 24, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 106 IBLA 104, 95 I.D. 265 (1988)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1613(a) ----- 86 IBLA 268 (May 10, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 92 IBLA 314 (June 26, 1986)  
 92 IBLA 316 (June 26, 1986)  
 92 IBLA 340 (June 30, 1986)  
 93 IBLA 369 (Sept. 17, 1986)  
 97 IBLA 261 (May 13, 1987)



## TITLE 43: (Cont.)

sec. 1613(a) ----- 97 IBLA 342 (May 22, 1987)  
 98 IBLA 88 (June 10, 1987)  
 101 IBLA 73 (Jan. 29, 1988)  
 101 IBLA 333 (Mar. 23, 1988)  
 103 IBLA 71 (June 28, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 105 IBLA 380 (Nov. 29, 1988)  
 1613(a)(1) --- 99 IBLA 213 (Oct. 15, 1987)  
 1613(c) ----- 94 IBLA 107 (Oct. 7, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 95 IBLA 387 (Feb. 24, 1987)  
 97 IBLA 342 (May 22, 1987)  
 98 IBLA 88 (June 10, 1987)  
 1613(c)(1) --- 96 IBLA 42 (Feb. 27, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 97 IBLA 261 (May 13, 1987)  
 97 IBLA 342 (May 22, 1987)  
 1613(c)(3) --- 98 IBLA 177 (June 24, 1987)  
 1613(c)(5) --- 85 IBLA 366 (Mar. 26, 1985)  
 1613(e) ----- 97 IBLA 235 (May 12, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 105 IBLA 380 (Nov. 29, 1988)  
 1613(f) ----- 85 IBLA 366 (Mar. 26, 1985)  
 92 IBLA 314 (June 26, 1986)  
 100 IBLA 7 (Nov. 13, 1987)  
 105 IBLA 380 (Nov. 29, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1613(g) ----- 86 IBLA 268 (May 10, 1985)  
 87 IBLA 58 (May 28, 1985)  
 88 IBLA 106 (July 23, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 92 IBLA 340 (June 30, 1986)  
 97 IBLA 229 (May 11, 1987)  
 97 IBLA 367 (May 27, 1987)  
 98 IBLA 88 (June 10, 1987)  
 98 IBLA 378 (Aug. 4, 1987)  
 102 IBLA 200 (May 9, 1988)  
 103 IBLA 71 (June 28, 1988)  
 103 IBLA 138 (July 20, 1988)  
 105 IBLA 50 (Oct. 17, 1988)  
 106 IBLA 104, 95 I.D. 265 (1988)  
 109 IBLA 128 (June 8, 1989)  
 111 IBLA 186 (Oct. 6, 1989)  
 1613(h) ----- 87 IBLA 96 (May 30, 1985)  
 87 IBLA 264 (June 24, 1985)  
 87 IBLA 283 (June 25, 1985)  
 88 IBLA 336 (Sept. 19, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 90 IBLA 54 (Dec. 10, 1985)  
 91 IBLA 317 (Apr. 15, 1986)  
 93 IBLA 147 (July 30, 1986)  
 95 IBLA 33 (Dec. 15, 1986)  
 96 IBLA 368 (Apr. 10, 1987)  
 97 IBLA 367 (May 27, 1987)  
 1613(h)(i) --- 101 IBLA 38 (Jan. 26, 1988)  
 1613(h)(1) --- 87 IBLA 96 (May 30, 1985)  
 92 IBLA 312 (June 26, 1986)  
 95 IBLA 33 (Dec. 15, 1986)  
 101 IBLA 38 (Jan. 26, 1988)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1613(h)(2) --- 85 IBLA 250 (Mar. 6, 1985)  
 86 IBLA 340 (May 16, 1985)  
 87 IBLA 67 (May 28, 1985)  
 87 IBLA 283 (June 25, 1985)  
 93 IBLA 169 (Aug. 15, 1986)  
 94 IBLA 24 (Sept. 25, 1986)  
 97 IBLA 367 (May 27, 1987)  
 1613(h)(3) --- 87 IBLA 58 (May 28, 1985)  
 92 IBLA 340 (June 30, 1986)  
 1613(h)(5) --- 92 IBLA 340 (June 30, 1986)  
 93 IBLA 147 (July 30, 1986)  
 98 IBLA 157 (June 24, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 Secy Order, 94 I.D. 339 (1987)

## TITLE 43 (Cont.)

sec. 1613(h)(6) --- 105 IBLA 137 (Oct. 27, 1988)  
 1613(h)(7) --- 97 IBLA 367 (May 27, 1987)  
 Secy Order, 94 I.D. 339 (1987)  
 1613(h)(8) --- 89 IBLA 285, 92 I.D. 564 (1985)  
 101 IBLA 375 (Mar. 30, 1988)  
 111 IBLA 186 (Oct. 6, 1989)  
 1613(h)(9) --- 97 IBLA 367 (May 27, 1987)  
 105 IBLA 137 (Oct. 27, 1988)  
 1615 ----- 87 IBLA 96 (May 30, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 94 IBLA 107 (Oct. 7, 1986)  
 96 IBLA 368 (Apr. 10, 1987)  
 105 IBLA 137 (Oct. 27, 1988)  
 1615(b) ----- 85 IBLA 165 (Feb. 25, 1985)  
 94 IBLA 107 (Oct. 7, 1986)  
 1616 ----- 90 IBLA 273 (Feb. 5, 1986)  
 93 IBLA 250 (Aug. 26, 1986)  
 1616(a)(1) --- 88 IBLA 106 (July 23, 1985)  
 1616(b) ----- 85 IBLA 273, 92 I.D. 134 (1985)  
 85 IBLA 311 (Mar. 21, 1985)  
 85 IBLA 366 (Mar. 26, 1985)  
 86 IBLA 325 (May 16, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 90 IBLA 135, 92 I.D. 620 (1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 93 IBLA 250 (Aug. 26, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 95 IBLA 346 (Feb. 4, 1987)  
 98 IBLA 378 (Aug. 4, 1987)  
 99 IBLA 25 (Aug. 26, 1987)  
 104 IBLA 12 (Aug. 17, 1988)  
 1616(b)(1) --- 86 IBLA 263 (May 10, 1985)  
 99 IBLA 25 (Aug. 26, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 1616(b)(2) --- 94 IBLA 107 (Oct. 7, 1986)  
 99 IBLA 25 (Aug. 26, 1987)  
 100 IBLA 261 (Dec. 9, 1987)  
 1616(b)(3) --- 85 IBLA 311 (Mar. 21, 1985)  
 88 IBLA 106 (July 23, 1985)  
 98 IBLA 378 (Aug. 4, 1987)  
 1616(d) ----- 86 IBLA 85 (Apr. 11, 1985)  
 89 IBLA 189 (Oct. 17, 1985)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1616(d)(1) --- 86 IBLA 85 (Apr. 11, 1985)  
 87 IBLA 96 (May 30, 1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 92 IBLA 87 (May 28, 1986)  
 98 IBLA 241 (July 6, 1987)  
 101 IBLA 158 (Feb. 10, 1988)  
 104 IBLA 93 (Aug. 31, 1988)  
 104 IBLA 204 (Sept. 12, 1988)  
 1616(d)(2) --- 87 IBLA 96 (May 30, 1985)  
 104 IBLA 204 (Sept. 12, 1988)  
 1616(d)(2)(A)--- 86 IBLA 85 (Apr. 11, 1985)  
 89 IBLA 341 (Nov. 13, 1985)  
 101 IBLA 158 (Feb. 10, 1988)  
 1616(d)(2)(C)--- 86 IBLA 85 (Apr. 11, 1985)  
 1617 ----- 87 IBLA 58 (May 28, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 90 IBLA 273 (Feb. 5, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 93 IBLA 355 (Sept. 15, 1986)  
 94 IBLA 38 (Sept. 25, 1986)  
 95 IBLA 261 (Jan. 27, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 102 IBLA 182 (May 5, 1988)  
 104 IBLA 277 (Sept. 13, 1988)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 108 IBLA 282 (Apr. 26, 1989)  
 110 IBLA 367 (Sept. 14, 1989)

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## TITLE 43: (Cont.)

sec. 1617(a) ----- 85 IBLA 196 (Feb. 27, 1985)  
 85 IBLA 363 (Mar. 25, 1985)  
 89 IBLA 251 (Oct. 31, 1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 90 IBLA 265 (Jan. 31, 1986)  
 91 IBLA 343 (Apr. 21, 1986)  
 92 IBLA 174 (June 11, 1986)  
 93 IBLA 147 (July 30, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 96 IBLA 42 (Feb. 27, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 132, 94 I.D. 151 (1987)  
 97 IBLA 350 (May 26, 1987)  
 98 IBLA 203 (June 29, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 101 IBLA 333 (Mar. 23, 1988)  
 102 IBLA 131 (Apr. 21, 1988)  
 103 IBLA 112 (July 19, 1988)  
 105 IBLA 137 (Oct. 27, 1988)  
 107 IBLA 229 (Feb. 21, 1989)  
 107 IBLA 272 (Feb. 23, 1989)  
 107 IBLA 282 (Apr. 26, 1989)  
 109 IBLA 128 (June 28, 1989)  
 109 IBLA 339 (June 20, 1989)  
 109 IBLA 347 (June 23, 1989)  
 111 IBLA 139 (Sept. 29, 1989)  
 111 IBLA 271 (Oct. 26, 1989)  
 111 IBLA 360 (Nov. 3, 1989)  
 112 IBLA 181 (Dec. 11, 1989)  
 Secy Order, 94 I.D. 339 (1987)  
 1618 ----- 93 IBLA 369 (Sept. 17, 1986)  
 108 IBLA 282 (Apr. 26, 1989)  
 1618(a) ----- 93 IBLA 190 (Aug. 15, 1986)  
 95 IBLA 80 (Dec. 29, 1986)  
 1621 ----- 106 IBLA 230, 95 I.D. 314 (1988)  
 1621(b) ----- 87 IBLA 58 (May 28, 1985)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 109 IBLA 128 (June 8, 1989)  
 1621(c) ----- 88 IBLA 106 (July 23, 1985)  
 98 IBLA 378 (Aug. 4, 1987)  
 1621(q) ----- 97 IBLA 367 (May 27, 1987)  
 1621(h) ----- 101 IBLA 158 (Feb. 10, 1988)  
 106 IBLA 26 (Dec. 7, 1988)  
 1621(h)(1) --- 105 IBLA 137 (Oct. 27, 1988)  
 1621(i) ----- 95 IBLA 225 (Jan. 16, 1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 1621(j) ----- 86 IBLA 268 (May 10, 1985)  
 87 IBLA 58 (May 28, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 91 IBLA 305 (Apr. 15, 1986)  
 92 IBLA 316 (June 26, 1986)  
 101 IBLA 333 (Mar. 23, 1988)  
 1621(j)(1) --- 87 IBLA 58 (May 28, 1985)  
 91 IBLA 305 (Apr. 15, 1986)  
 98 IBLA 88 (June 10, 1987)  
 101 IBLA 375 (Mar. 30, 1988)  
 1621(l) ----- 92 IBLA 101 (May 30, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 98 IBLA 177 (June 24, 1987)  
 106 IBLA 26 (Dec. 7, 1988)  
 1627 ----- 105 IBLA 380 (Nov. 29, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1627(e) ----- 105 IBLA 380 (Nov. 29, 1988)  
 107 IBLA 266 (Feb. 23, 1989)  
 1631(b) ----- 90 IBLA 135, 92 I.D. 620 (1985)  
 100 IBLA 50, 94 I.D. 422 (1987)  
 1633(a) ----- 85 IBLA 311 (Mar. 21, 1985)  
 1633(a)(2) --- 101 IBLA 76 (Feb. 2, 1988)  
 1634 ----- 85 IBLA 196 (Feb. 27, 1985)  
 85 IBLA 363 (Mar. 25, 1985)  
 87 IBLA 58 (May 28, 1985)  
 89 IBLA 251 (Oct. 31, 1985)

## TITLE 43: (Cont.)

sec. 1634 ----- 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 91 IBLA 343 (Apr. 21, 1986)  
 92 IBLA 340 (June 30, 1986)  
 93 IBLA 355 (Sept. 15, 1986)  
 95 IBLA 346 (Feb. 4, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 97 IBLA 261 (May 13, 1987)  
 97 IBLA 342 (May 22, 1987)  
 97 IBLA 350 (May 26, 1987)  
 99 IBLA 213 (Oct. 15, 1987)  
 100 IBLA 7 (Nov. 13, 1987)  
 102 IBLA 131 (Apr. 21, 1988)  
 103 IBLA 112 (July 19, 1988)  
 107 IBLA 229 (Feb. 21, 1989)  
 110 IBLA 224 (Aug. 24, 1989)  
 1634(a) ----- 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 91 IBLA 305 (Apr. 15, 1986)  
 92 IBLA 174 (June 11, 1986)  
 92 IBLA 340 (June 30, 1986)  
 95 IBLA 391 (Feb. 24, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 101 IBLA 333 (Mar. 23, 1988)  
 109 IBLA 339 (June 22, 1989)  
 110 IBLA 224 (Aug. 24, 1989)  
 110 IBLA 367 (Sept. 14, 1989)  
 111 IBLA 53 (Sept. 20, 1989)  
 1634(a)(1) --- 87 IBLA 58 (May 28, 1985)  
 88 IBLA 349 (Sept. 24, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 273 (Feb. 5, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 91 IBLA 305 (Apr. 15, 1986)  
 93 IBLA 355 (Sept. 15, 1986)  
 93 IBLA 369 (Sept. 17, 1986)  
 94 IBLA 38 (Sept. 25, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 95 IBLA 261 (Jan. 27, 1987)  
 96 IBLA 42 (Feb. 27, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 132, 94 I.D. 151 (1987)  
 97 IBLA 261 (May 13, 1987)  
 97 IBLA 350 (May 26, 1987)  
 107 IBLA 272 (Feb. 23, 1989)  
 111 IBLA 139 (Sept. 29, 1989)  
 112 IBLA 181 (Dec. 11, 1989)  
 1634(a)(3) --- 90 IBLA 330 (Feb. 26, 1986)  
 100 IBLA 7 (Nov. 13, 1987)  
 1634(a)(4) --- 85 IBLA 196 (Feb. 27, 1985)  
 89 IBLA 251 (Oct. 31, 1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 109 IBLA 339 (June 22, 1989)  
 112 IBLA 181 (Dec. 11, 1989)  
 1634(a)(5) --- 85 IBLA 196 (Feb. 27, 1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 330 (Feb. 26, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 132, 94 I.D. 151 (1987)  
 109 IBLA 128 (June 8, 1989)  
 110 IBLA 224 (Aug. 24, 1989)  
 1634(a)(5)(A)- 88 IBLA 349 (Sept. 24, 1985)

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## TITLE 43: (Cont.)

sec. 1634(a)(5)(B)- 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 168 (Jan. 8, 1986)  
 90 IBLA 273 (Feb. 5, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 95 IBLA 261 (Jan. 27, 1987)  
 95 IBLA 346 (Feb. 4, 1987)  
 96 IBLA 301 (Apr. 2, 1987)  
 102 IBLA 182 (May 5, 1988)  
 103 IBLA 112 (July 19, 1988)  
 104 IBLA 12 (Aug. 17, 1988)  
 110 IBLA 224 (Aug. 24, 1989)  
 111 IBLA 77 (Sept. 26, 1989)  
 111 IBLA 139 (Sept. 29, 1989)  
 1634(a)(5)(C)- 89 IBLA 251 (Oct. 31, 1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 265 (Jan. 31, 1986)  
 90 IBLA 330 (Feb. 26, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 96 IBLA 209 (Mar. 19, 1987)  
 107 IBLA 229 (Feb. 21, 1989)  
 110 IBLA 224 (Aug. 24, 1989)  
 111 IBLA 53 (Sept. 20, 1989)  
 1634(a)(6) --- 87 IBLA 58 (May 28, 1985)  
 92 IBLA 340 (June 30, 1986)  
 93 IBLA 355 (Sept. 15, 1986)  
 95 IBLA 391 (Feb. 24, 1987)  
 103 IBLA 96 (July 12, 1988)  
 1634(c) ----- 85 IBLA 196 (Feb. 27, 1985)  
 86 IBLA 26 (Mar. 29, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 93 IBLA 369 (Sept. 17, 1986)  
 96 IBLA 301 (Apr. 2, 1987)  
 97 IBLA 27 (Apr. 23, 1987)  
 97 IBLA 132, 94 I.D. 151 (1987)  
 97 IBLA 359 (May 26, 1987)  
 103 IBLA 96 (July 12, 1988)  
 104 IBLA 277 (Sept. 13, 1988)  
 107 IBLA 272 (Feb. 23, 1989)  
 1634(d) ----- 90 IBLA 330 (Feb. 26, 1986)  
 107 IBLA 272 (Feb. 23, 1989)  
 1634(e) ----- 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 330 (Feb. 26, 1986)  
 96 IBLA 209 (Mar. 19, 1987)  
 1635 ----- 85 IBLA 206, 92 I.D. 109 (1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 1635(c) ----- 85 IBLA 196 (Feb. 27, 1985)  
 87 IBLA 58 (May 28, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 92 IBLA 228 (June 24, 1986)  
 93 IBLA 369 (Sept. 17, 1986)  
 95 IBLA 196 (Jan. 14, 1987)  
 95 IBLA 379 (Feb. 20, 1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 1635(c)(1) --- 85 IBLA 206, 92 I.D. 109 (1985)  
 90 IBLA 152 (Dec. 30, 1985)  
 93 IBLA 169 (Aug. 15, 1986)  
 93 IBLA 369 (Sept. 17, 1986)  
 94 IBLA 74 (Sept. 30, 1986)  
 96 IBLA 311 (Apr. 2, 1987)  
 99 IBLA 201 (Oct. 13, 1987)  
 105 IBLA 137 (Oct. 27, 1988)  
 1635(c)(4) --- 92 IBLA 223 (June 24, 1986)  
 1635(d)(1) --- 105 IBLA 137 (Oct. 27, 1988)  
 1635(e) ----- 105 IBLA 137 (Oct. 27, 1988)  
 108 IBLA 181 (Apr. 13, 1989)  
 109 IBLA 339 (June 22, 1989)  
 110 IBLA 20 (July 6, 1989)  
 1635(h)(3) --- 93 IBLA 369 (Sept. 17, 1986)  
 1635(h)(4) --- 93 IBLA 369 (Sept. 17, 1986)  
 1635(i) ----- 105 IBLA 137 (Oct. 27, 1988)  
 1635(k) ----- 99 IBLA 201 (Oct. 13, 1987)  
 1635(l)(1) --- 99 IBLA 201 (Oct. 13, 1987)  
 1639 ----- 105 IBLA 137 (Oct. 27, 1988)

## TITLE 43: (Cont.)

sec. 1641 ----- 93 IBLA 369 (Sept. 17, 1986)  
 1641(a) ----- 93 IBLA 369 (Sept. 17, 1986)  
 1641(b)(3) --- 93 IBLA 369 (Sept. 17, 1986)  
 1641(c) ----- 93 IBLA 369 (Sept. 17, 1986)  
 1641(f) ----- 93 IBLA 250 (Aug. 26, 1986)  
 1651-1655 --- 90 IBLA 273 (Feb. 5, 1986)  
 1701 ----- 85 IBLA 343, 92 I.D. 140 (1985)  
 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 296 (May 13, 1985)  
 87 IBLA 81 (May 29, 1985)  
 87 IBLA 210 (June 18, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 90 IBLA 342 (Feb. 26, 1986)  
 93 IBLA 103 (July 23, 1986)  
 94 IBLA 183 (Oct. 21, 1986)  
 95 IBLA 239 (Jan. 16, 1987)  
 100 IBLA 1 (Nov. 12, 1987)  
 101 IBLA 234 (Feb. 29, 1988)  
 103 IBLA 228 (July 26, 1988)  
 104 IBLA 374 (Sept. 27, 1988)  
 110 IBLA 216 (Aug. 23, 1989)  
 1701-1782 --- 87 IBLA 271 (June 25, 1985)  
 92 IBLA 333 (June 30, 1986)  
 94 IBLA 115 (Oct. 9, 1986)  
 102 IBLA 175 (May 3, 1988)  
 106 IBLA 346 (Jan. 12, 1989)  
 1701-1783 --- 109 IBLA 274 (June 20, 1989)  
 1701-1784 --- 88 IBLA 66, 92 I.D. 317 (1985)  
 89 IBLA 189 (Oct. 17, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 95 IBLA 136 (Jan. 12, 1987)  
 98 IBLA 143 (June 22, 1987)  
 98 IBLA 258 (July 7, 1987)  
 105 IBLA 196 (Nov. 2, 1988)  
 106 IBLA 327 (Jan. 9, 1989)  
 111 IBLA 122 (Sept. 29, 1989)  
 6 OHA 52 (June 28, 1985)  
 1701 et seq. - 90 IBLA 112 (Dec. 23, 1985)  
 90 IBLA 200 (Jan. 30, 1986)  
 M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1701(a) ----- 87 IBLA 271 (June 25, 1985)  
 104 IBLA 145 (Sept. 2, 1988)  
 1701(a)(1) --- 99 IBLA 327 (Oct. 29, 1987)  
 1701(a)(5) --- 91 IBLA 124 (Mar. 19, 1986)  
 108 IBLA 177 (Apr. 12, 1989)  
 109 IBLA 274 (June 20, 1989)  
 1701(a)(7) --- 92 IBLA 200 (June 12, 1986)  
 99 IBLA 327 (Oct. 29, 1987)  
 1701(a)(8) --- 105 IBLA 196 (Nov. 2, 1988)  
 105 IBLA 245 (Nov. 4, 1988)  
 111 IBLA 207 (Oct. 12, 1989)  
 M-36914 (Supp. III), 96 I.D. 211 (1989)  
 1701(a)(9) --- 96 IBLA 13 (Feb. 26, 1987)  
 96 IBLA 374 (Apr. 14, 1987)  
 100 IBLA 172 (Dec. 8, 1987)  
 104 IBLA 317 (Sept. 20, 1988)  
 105 IBLA 14 (Oct. 11, 1988)  
 1701(b) ----- 104 IBLA 145 (Sept. 2, 1988)  
 1701(b)(1) --- 93 IBLA 267 (Aug. 29, 1986)  
 1702 ----- 97 IBLA 367 (May 27, 1987)  
 M-36964, 96 I.D. 439 (1989)  
 1702(a) ----- 91 IBLA 172 (Mar. 28, 1986)  
 1702(c) ----- 92 IBLA 200 (June 12, 1986)  
 Secy Order, 94 I.D. 339 (1987)  
 1702(e) ----- 89 IBLA 263 (Nov. 6, 1985)  
 95 IBLA 225 (Jan. 16, 1987)  
 105 IBLA 345 (Nov. 17, 1988)  
 1702(f) ----- 95 IBLA 225 (Jan. 16, 1987)  
 1702(h) ----- 86 IBLA 296 (May 13, 1985)  
 1702(j) ----- 96 IBLA 61 (Feb. 27, 1987)  
 106 IBLA 327 (Jan. 9, 1989)



## TITLE 43: (Cont.)

sec. 1702(1) ----- 106 IBLA 104, 95 I.D. 265 (1988)  
 1705(a)(5) --- 102 IBLA 38 (Apr. 11, 1988)  
 1712 ----- 108 IBLA 140 (Apr. 3, 1989)  
 111 IBLA 207 (Oct. 12, 1989)  
 1712(a) ----- 87 IBLA 271 (June 25, 1985)  
 1712(b)(3) --- 93 IBLA 267 (Aug. 29, 1986)  
 1712(c) ----- 87 IBLA 271 (June 25, 1985)  
 1712(c)(7) --- 105 IBLA 245 (Nov. 4, 1988)  
 1713 ----- 87 IBLA 81 (May 29, 1985)  
 89 IBLA 219 (Oct. 28, 1985)  
 93 IBLA 155 (July 31, 1986)  
 93 IBLA 221 (Aug. 20, 1986)  
 93 IBLA 256 (Aug. 27, 1986)  
 94 IBLA 88 (Sept. 30, 1986)  
 94 IBLA 173 (Oct. 29, 1986)  
 95 IBLA 382 (Feb. 20, 1987)  
 97 IBLA 126 (Apr. 30, 1987)  
 99 IBLA 10 (Aug. 12, 1987)  
 99 IBLA 170 (Oct. 2, 1987)  
 99 IBLA 327 (Oct. 29, 1987)  
 102 IBLA 235 (May 19, 1988)  
 106 IBLA 207 (Dec. 21, 1988)  
 107 IBLA 323 (Mar. 8, 1989)  
 108 IBLA 130 (Apr. 3, 1989)  
 111 IBLA 217, 96 I.D. 452 (1989)  
 112 IBLA 72 (Nov. 22, 1989)  
 1713(a) ----- 93 IBLA 256 (Aug. 27, 1986)  
 99 IBLA 10 (Aug. 12, 1987)  
 99 IBLA 327 (Oct. 29, 1987)  
 101 IBLA 52 (Jan. 26, 1988)  
 102 IBLA 235 (May 19, 1988)  
 112 IBLA 72 (Nov. 22, 1989)  
 1713(a)(1) --- 95 IBLA 382 (Feb. 20, 1987)  
 101 IBLA 52 (Jan. 26, 1988)  
 112 IBLA 72 (Nov. 22, 1989)  
 1713(c) ----- 87 IBLA 271 (June 25, 1985)  
 1713(d) ----- 89 IBLA 219 (Oct. 28, 1985)  
 106 IBLA 207 (Dec. 21, 1988)  
 1713(e) ----- 95 IBLA 382 (Feb. 20, 1987)  
 1713(f) ----- 89 IBLA 171 (Oct. 11, 1985)  
 93 IBLA 256 (Aug. 27, 1986)  
 94 IBLA 88 (Sept. 30, 1986)  
 99 IBLA 327 (Oct. 29, 1987)  
 102 IBLA 235 (May 19, 1988)  
 1713(g) ----- 108 IBLA 130 (Apr. 3, 1989)  
 1714 ----- 88 IBLA 66, 92 I.D. 317 (1985)  
 89 IBLA 189 (Oct. 17, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 96 IBLA 256 (Mar. 25, 1987)  
 98 IBLA 391 (Aug. 5, 1987)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 106 IBLA 327 (Jan. 9, 1989)  
 M-36950, 92 I.D. 512 (1985)  
 1714(a) ----- 90 IBLA 163 (Jan. 8, 1986)  
 98 IBLA 391 (Aug. 5, 1987)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 105 IBLA 40 (Oct. 14, 1988)  
 106 IBLA 327 (Jan. 9, 1989)  
 1714(b) ----- 88 IBLA 66, 92 I.D. 317 (1985)  
 1714(b)(1) --- 90 IBLA 147 (Dec. 30, 1985)  
 98 IBLA 241 (July 6, 1987)  
 108 IBLA 334 (May 8, 1989)  
 1714(c) ----- 96 IBLA 61 (Feb. 27, 1987)  
 103 IBLA 192, 95 I.D. 102 (1988)  
 1714(e) ----- 104 IBLA 204 (Sept. 12, 1988)  
 1714(g) ----- 88 IBLA 66, 92 I.D. 317 (1985)  
 1714(i) ----- 105 IBLA 40 (Oct. 14, 1988)  
 1714(j) ----- 103 IBLA 192, 95 I.D. 102 (1988)  
 M-36950, 92 I.D. 512 (1985)  
 1714(l) ----- 85 IBLA 243 (Mar. 4, 1985)  
 99 IBLA 16 (Aug. 14, 1987)  
 107 IBLA 118 (Feb. 2, 1989)  
 1715 ----- 98 IBLA 251 (July 7, 1987)

## TITLE 43: (Cont.)

sec. 1716 ----- 85 IBLA 1 (Jan. 30, 1985)  
 85 IBLA 224 (Feb. 28, 1985)  
 87 IBLA 109 (May 31, 1985)  
 87 IBLA 210 (June 18, 1985)  
 87 IBLA 308 (June 25, 1985)  
 90 IBLA 200 (Jan. 30, 1986)  
 90 IBLA 360 (Feb. 27, 1986)  
 94 IBLA 243 (Nov. 13, 1986)  
 101 IBLA 1 (Jan. 20, 1988)  
 103 IBLA 397 (Aug. 15, 1988)  
 106 IBLA 374 (Jan. 19, 1989)  
 1716(a) ----- 90 IBLA 360 (Feb. 27, 1986)  
 94 IBLA 243 (Nov. 13, 1986)  
 102 IBLA 1 (Apr. 5, 1988)  
 103 IBLA 397 (Aug. 15, 1988)  
 107 IBLA 323 (Mar. 8, 1989)  
 1716(a)(1) --- 87 IBLA 271 (June 25, 1985)  
 1716(b) ----- 85 IBLA 224 (Feb. 28, 1985)  
 90 IBLA 200 (Jan. 30, 1986)  
 94 IBLA 243 (Nov. 13, 1986)  
 102 IBLA 1 (Apr. 5, 1988)  
 1717 ----- 94 IBLA 243 (Nov. 13, 1986)  
 102 IBLA 1 (Apr. 5, 1988)  
 1719 ----- 89 IBLA 179 (Oct. 16, 1985)  
 89 IBLA 219 (Oct. 28, 1985)  
 93 IBLA 128 (July 29, 1986)  
 93 IBLA 221 (Aug. 20, 1986)  
 96 IBLA 290 (Mar. 31, 1987)  
 102 IBLA 235 (May 19, 1988)  
 102 IBLA 396 (June 21, 1988)  
 111 IBLA 217, 96 I.D. 452 (1989)  
 1719(a) ----- 102 IBLA 235 (May 19, 1988)  
 111 IBLA 217, 96 I.D. 452 (1989)  
 1719(b) ----- 85 IBLA 397 (Mar. 29, 1985)  
 86 IBLA 175 (Apr. 26, 1985)  
 88 IBLA 300 (Sept. 13, 1985)  
 89 IBLA 179 (Oct. 16, 1985)  
 90 IBLA 83 (Dec. 20, 1985)  
 96 IBLA 290 (Mar. 31, 1987)  
 105 IBLA 211 (Nov. 2, 1988)  
 105 IBLA 375 (Nov. 29, 1988)  
 1719(b)(1) --- 85 IBLA 397 (Mar. 29, 1985)  
 86 IBLA 175 (Apr. 26, 1985)  
 88 IBLA 300 (Sept. 13, 1985)  
 89 IBLA 179 (Oct. 16, 1985)  
 90 IBLA 83 (Dec. 20, 1985)  
 93 IBLA 128 (July 29, 1986)  
 96 IBLA 290 (Mar. 31, 1987)  
 102 IBLA 235 (May 19, 1988)  
 104 IBLA 164 (Sept. 6, 1988)  
 105 IBLA 375 (Nov. 29, 1988)  
 1719(b)(2) --- 89 IBLA 179 (Oct. 16, 1985)  
 93 IBLA 128 (July 29, 1986)  
 97 IBLA 121 (Apr. 30, 1987)  
 105 IBLA 375 (Nov. 29, 1988)  
 1719(b)(3) --- 89 IBLA 179 (Oct. 16, 1985)  
 1719(b)(3)(i)--- 93 IBLA 128 (July 29, 1986)  
 104 IBLA 164 (Sept. 6, 1988)  
 1720 ----- 87 IBLA 271 (June 25, 1985)  
 1732 ----- 88 IBLA 367 (Sept. 27, 1985)  
 99 IBLA 225 (Oct. 16, 1987)  
 104 IBLA 141 (Sept. 2, 1988)  
 108 IBLA 224 (Apr. 19, 1989)  
 1732(a) ----- 91 IBLA 172 (Mar. 28, 1986)  
 92 IBLA 200 (June 12, 1986)  
 111 IBLA 207 (Oct. 12, 1989)  
 M-36914 (Supp. III), 96 I.D. 211 (1989)  
 Secy Order, 94 I.D. 339 (1987)  
 1732(b) ----- 85 IBLA 354 (Mar. 25, 1985)  
 86 IBLA 319 (May 16, 1985)  
 86 IBLA 350, 92 I.D. 208 (1985)  
 88 IBLA 367 (Sept. 27, 1985)



## (B) United States Codes

## TITLE 43: (Cont.)

sec. 1732(b) ----- 90 IBLA 112 (Dec. 23, 1985)  
 91 IBLA 291 (Apr. 15, 1986)  
 91 IBLA 296 (Apr. 15, 1986)  
 93 IBLA 103 (July 23, 1986)  
 94 IBLA 98 (Oct. 1, 1986)  
 95 IBLA 52 (Dec. 19, 1986)  
 95 IBLA 382 (Feb. 20, 1987)  
 99 IBLA 225 (Oct. 16, 1987)  
 102 IBLA 155, 95 I.D. 61 (1988)  
 105 IBLA 345 (Nov. 17, 1988)  
 108 IBLA 271 (Apr. 25, 1989)  
 108 IBLA 381 (May 19, 1989)  
 110 IBLA 57 (July 13, 1989)  
 1732(c) ----- 96 IBLA 356, 94 I.D. 132 (1987)  
 101 IBLA 177 (Feb. 17, 1988)  
 102 IBLA 155, 95 I.D. 61 (1988)  
 108 IBLA 102 (Mar. 29, 1989)  
 1734 ----- 99 IBLA 95 (Sept. 17, 1987)  
 101 IBLA 177 (Feb. 17, 1988)  
 1734(a) ----- 95 IBLA 90 (Dec. 29, 1986)  
 1734(b) ----- 108 IBLA 224 (Apr. 19, 1989)  
 1734(c) ----- 90 IBLA 70 (Dec. 16, 1985)  
 92 IBLA 365, 93 I.D. 285 (1986)  
 95 IBLA 90 (Dec. 29, 1986)  
 95 IBLA 267 (Jan. 27, 1987)  
 95 IBLA 374 (Feb. 18, 1987)  
 96 IBLA 149, 94 I.D. 69 (1987)  
 101 IBLA 152 (Feb. 9, 1988)  
 102 IBLA 329 (June 3, 1988)  
 103 IBLA 241 (July 26, 1988)  
 103 IBLA 255 (July 27, 1988)  
 106 IBLA 230, 95 I.D. 314 (1988)  
 1737 ----- 85 IBLA 237 (Mar. 4, 1985)  
 1737(a) ----- 86 IBLA 296 (May 13, 1985)  
 109 IBLA 112 (June 7, 1989)  
 1739 ----- 105 IBLA 369 (Nov. 28, 1988)  
 1740 ----- 99 IBLA 387 (Nov. 10, 1987)  
 1744 ----- 85 IBLA 33 (Jan. 31, 1985)  
 85 IBLA 241 (Mar. 4, 1985)  
 86 IBLA 215 (Apr. 30, 1985)  
 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 286 (May 13, 1985)  
 86 IBLA 291 (May 13, 1985)  
 87 IBLA 20 (May 21, 1985)  
 87 IBLA 23 (May 21, 1985)  
 87 IBLA 31 (May 22, 1985)  
 87 IBLA 52 (May 23, 1985)  
 87 IBLA 88 (May 30, 1985)  
 87 IBLA 102 (May 30, 1985)  
 87 IBLA 106 (May 30, 1985)  
 87 IBLA 113 (May 31, 1985)  
 87 IBLA 129 (June 6, 1985)  
 87 IBLA 132 (June 7, 1985)  
 87 IBLA 139 (June 10, 1985)  
 87 IBLA 143 (June 10, 1985)  
 87 IBLA 158 (June 11, 1985)  
 87 IBLA 165 (June 12, 1985)  
 87 IBLA 172 (June 13, 1985)  
 87 IBLA 175 (June 13, 1985)  
 87 IBLA 191 (June 13, 1985)  
 87 IBLA 207 (June 18, 1985)  
 87 IBLA 225 (June 19, 1985)  
 87 IBLA 261 (June 21, 1985)  
 87 IBLA 264 (June 24, 1985)  
 87 IBLA 266 (June 25, 1985)  
 87 IBLA 293 (June 25, 1985)  
 87 IBLA 306 (June 25, 1985)  
 87 IBLA 328 (June 26, 1985)  
 87 IBLA 338 (June 26, 1985)  
 87 IBLA 341 (June 26, 1985)  
 87 IBLA 345 (June 26, 1985)  
 87 IBLA 348 (June 26, 1985)  
 87 IBLA 367 (June 27, 1985)

## TITLE 43: (Cont.)

sec. 1744 ----- 88 IBLA 4 (June 28, 1985)  
 88 IBLA 19 (July 1, 1985)  
 88 IBLA 22 (July 2, 1985)  
 88 IBLA 36 (July 9, 1985)  
 88 IBLA 42 (July 10, 1985)  
 88 IBLA 45 (July 10, 1985)  
 88 IBLA 54 (July 16, 1985)  
 88 IBLA 58 (July 17, 1985)  
 88 IBLA 66, 92 I.D. 317 (1985)  
 88 IBLA 111 (July 31, 1985)  
 88 IBLA 114 (July 31, 1985)  
 88 IBLA 117 (July 31, 1985)  
 88 IBLA 123 (Aug. 1, 1985)  
 88 IBLA 157 (Aug. 12, 1985)  
 88 IBLA 296 (Sept. 13, 1985)  
 88 IBLA 311 (Sept. 18, 1985)  
 88 IBLA 314 (Sept. 18, 1985)  
 88 IBLA 316 (Sept. 18, 1985)  
 88 IBLA 336 (Sept. 19, 1985)  
 88 IBLA 345 (Sept. 24, 1985)  
 88 IBLA 360 (Sept. 27, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 88 IBLA 372 (Sept. 27, 1985)  
 88 IBLA 377 (Sept. 27, 1985)  
 88 IBLA 379 (Sept. 27, 1985)  
 89 IBLA 141 (Oct. 1, 1985)  
 89 IBLA 143 (Oct. 1, 1985)  
 89 IBLA 224 (Oct. 28, 1985)  
 89 IBLA 248 (Oct. 29, 1985)  
 89 IBLA 257 (Oct. 31, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 89 IBLA 285, 92 I.D. 564 (1985)  
 89 IBLA 320 (Nov. 13, 1985)  
 89 IBLA 379 (Nov. 22, 1985)  
 90 IBLA 23, 92 I.D. 613 (1985)  
 90 IBLA 87 (Dec. 23, 1985)  
 90 IBLA 159 (Dec. 30, 1985)  
 90 IBLA 179 (Jan. 22, 1986)  
 90 IBLA 249 (Jan. 30, 1986)  
 90 IBLA 342 (Feb. 26, 1986)  
 91 IBLA 141 (Mar. 24, 1986)  
 92 IBLA 58 (May 13, 1986)  
 92 IBLA 101 (May 30, 1986)  
 92 IBLA 327 (June 27, 1986)  
 93 IBLA 1, 93 I.D. 288 (1986)  
 93 IBLA 113 (July 24, 1986)  
 93 IBLA 199 (Aug. 18, 1986)  
 93 IBLA 203 (Aug. 20, 1986)  
 93 IBLA 289 (Sept. 4, 1986)  
 94 IBLA 11 (Sept. 18, 1986)  
 94 IBLA 75 (Sept. 30, 1986)  
 94 IBLA 121 (Oct. 9, 1986)  
 94 IBLA 194 (Oct. 30, 1986)  
 95 IBLA 26 (Dec. 12, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 95 IBLA 132 (Jan. 7, 1987)  
 95 IBLA 379 (Feb. 20, 1987)  
 96 IBLA 311 (Apr. 2, 1987)  
 96 IBLA 391 (Apr. 14, 1987)  
 97 IBLA 27 (Apr. 23, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 97 IBLA 340 (May 21, 1987)  
 97 IBLA 356 (May 26, 1987)  
 97 IBLA 359 (May 26, 1987)  
 98 IBLA 75 (June 9, 1987)  
 98 IBLA 209 (July 1, 1987)  
 98 IBLA 241 (July 6, 1987)  
 98 IBLA 254 (July 7, 1987)  
 99 IBLA 33 (Aug. 31, 1987)  
 99 IBLA 120 (Sept. 22, 1987)  
 99 IBLA 159 (Sept. 29, 1987)  
 99 IBLA 397 (Nov. 10, 1987)

## TITLE 43: (Cont.)

sec. 1744 ----- 101 IBLA 106 (Feb. 2, 1988)  
 101 IBLA 120 (Feb. 8, 1988)  
 101 IBLA 202 (Feb. 22, 1988)  
 101 IBLA 272 (Mar. 10, 1988)  
 101 IBLA 399 (Apr. 4, 1988)  
 102 IBLA 212 (May 10, 1988)  
 102 IBLA 334 (June 3, 1988)  
 103 IBLA 121 (July 19, 1988)  
 103 IBLA 308 (Aug. 4, 1988)  
 104 IBLA 9 (Aug. 15, 1988)  
 104 IBLA 48 (Aug. 23, 1988)  
 104 IBLA 114 (Aug. 31, 1988)  
 104 IBLA 204 (Sept. 12, 1988)  
 104 IBLA 374 (Sept. 27, 1988)  
 104 IBLA 396 (Oct. 5, 1988)  
 105 IBLA 44 (Oct. 17, 1988)  
 105 IBLA 90, 95 I.D. 219 (1988)  
 105 IBLA 282 (Nov. 7, 1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 107 IBLA 47 (Jan. 27, 1989)  
 107 IBLA 118 (Feb. 2, 1989)  
 107 IBLA 140 (Feb. 6, 1989)  
 108 IBLA 102 (Mar. 29, 1989)  
 108 IBLA 121 (Mar. 30, 1989)  
 108 IBLA 152 (Apr. 7, 1989)  
 108 IBLA 247 (Apr. 24, 1989)  
 108 IBLA 347 (May 12, 1989)  
 109 IBLA 1 (May 22, 1989)  
 109 IBLA 19 (May 24, 1989)  
 109 IBLA 69 (May 30, 1989)  
 109 IBLA 76 (May 30, 1989)  
 109 IBLA 85 (May 31, 1989)  
 109 IBLA 320 (June 21, 1989)  
 109 IBLA 353 (June 23, 1989)  
 109 IBLA 357 (June 23, 1989)  
 109 IBLA 391 (June 26, 1989)  
 110 IBLA 1 (July 5, 1989)  
 110 IBLA 20 (July 6, 1989)  
 110 IBLA 245 (Aug. 31, 1989)  
 111 IBLA 144 (Sept. 29, 1989)  
 111 IBLA 148 (Sept. 29, 1989)  
 112 IBLA 130 (Nov. 30, 1989)  
 112 IBLA 160 (Dec. 11, 1989)  
 112 IBLA 228 (Dec. 19, 1989)  
 1744(a) ----- 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 283 (May 13, 1985)  
 86 IBLA 286 (May 13, 1985)  
 86 IBLA 291 (May 13, 1985)  
 87 IBLA 31 (May 22, 1985)  
 87 IBLA 88 (May 30, 1985)  
 87 IBLA 113 (May 31, 1985)  
 87 IBLA 129 (June 6, 1985)  
 87 IBLA 158 (June 11, 1985)  
 87 IBLA 161 (June 11, 1985)  
 87 IBLA 165 (June 12, 1985)  
 87 IBLA 172 (June 13, 1985)  
 87 IBLA 191 (June 13, 1985)  
 87 IBLA 204 (June 18, 1985)  
 87 IBLA 213 (June 18, 1985)  
 87 IBLA 261 (June 21, 1985)  
 87 IBLA 293 (June 25, 1985)  
 87 IBLA 328 (June 26, 1985)  
 87 IBLA 341 (June 26, 1985)  
 87 IBLA 345 (June 26, 1985)  
 87 IBLA 367 (June 27, 1985)  
 88 IBLA 4 (June 28, 1985)  
 88 IBLA 19 (July 1, 1985)  
 88 IBLA 36 (July 9, 1985)  
 88 IBLA 45 (July 10, 1985)  
 88 IBLA 54 (July 16, 1985)  
 88 IBLA 58 (July 17, 1985)  
 88 IBLA 114 (July 31, 1985)  
 88 IBLA 117 (July 31, 1985)

## TITLE 43: (Cont.)

sec. 1744(a) ----- 88 IBLA 123 (Aug. 1, 1985)  
 88 IBLA 276 (Sept. 5, 1985)  
 88 IBLA 296 (Sept. 13, 1985)  
 88 IBLA 314 (Sept. 18, 1985)  
 88 IBLA 345 (Sept. 24, 1985)  
 88 IBLA 379 (Sept. 27, 1985)  
 89 IBLA 137 (Oct. 1, 1985)  
 89 IBLA 143 (Oct. 1, 1985)  
 89 IBLA 224 (Oct. 28, 1985)  
 89 IBLA 345 (Nov. 14, 1985)  
 90 IBLA 159 (Dec. 30, 1985)  
 90 IBLA 313 (Feb. 25, 1986)  
 90 IBLA 342 (Feb. 26, 1986)  
 91 IBLA 113 (Mar. 17, 1986)  
 92 IBLA 223 (June 23, 1986)  
 93 IBLA 199 (Aug. 18, 1986)  
 94 IBLA 11 (Sept. 18, 1986)  
 94 IBLA 239 (Nov. 12, 1986)  
 95 IBLA 26 (Dec. 12, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 95 IBLA 128 (Jan. 6, 1987)  
 95 IBLA 328 (Jan. 30, 1987)  
 96 IBLA 391 (Apr. 14, 1987)  
 97 IBLA 27 (Apr. 23, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 97 IBLA 356 (May 26, 1987)  
 98 IBLA 75 (June 9, 1987)  
 98 IBLA 104 (June 15, 1987)  
 98 IBLA 123 (June 19, 1987)  
 98 IBLA 385 (Aug. 5, 1987)  
 99 IBLA 159 (Sept. 29, 1987)  
 101 IBLA 70 (Jan. 29, 1988)  
 101 IBLA 120 (Feb. 8, 1988)  
 101 IBLA 202 (Feb. 22, 1988)  
 101 IBLA 272 (Mar. 10, 1988)  
 103 IBLA 121 (July 19, 1988)  
 103 IBLA 392 (Aug. 15, 1988)  
 104 IBLA 9 (Aug. 15, 1988)  
 104 IBLA 48 (Aug. 23, 1988)  
 104 IBLA 374 (Sept. 27, 1988)  
 105 IBLA 40 (Oct. 14, 1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 107 IBLA 287 (Feb. 23, 1989)  
 108 IBLA 152 (Apr. 7, 1989)  
 108 IBLA 247 (Apr. 24, 1989)  
 108 IBLA 334 (May 8, 1989)  
 108 IBLA 347 (May 12, 1989)  
 110 IBLA 1 (July 5, 1989)  
 112 IBLA 160 (Dec. 11, 1989)  
 1744(a)(1) --- 87 IBLA 102 (May 30, 1985)  
 87 IBLA 132 (June 7, 1985)  
 87 IBLA 143 (June 10, 1985)  
 88 IBLA 367 (Sept. 27, 1985)  
 88 IBLA 372 (Sept. 27, 1985)  
 91 IBLA 141 (Mar. 24, 1986)  
 94 IBLA 239 (Nov. 12, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 98 IBLA 104 (June 15, 1987)  
 101 IBLA 202 (Feb. 22, 1988)  
 108 IBLA 121 (Mar. 30, 1989)  
 108 IBLA 152 (Apr. 7, 1989)  
 1744(a)(2) --- 86 IBLA 283 (May 13, 1985)  
 87 IBLA 23 (May 21, 1985)  
 87 IBLA 152 (June 11, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 372 (Sept. 27, 1985)  
 89 IBLA 141 (Oct. 1, 1985)  
 90 IBLA 313 (Feb. 25, 1986)  
 91 IBLA 245 (Apr. 8, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 96 IBLA 391 (Apr. 14, 1987)  
 98 IBLA 104 (June 15, 1987)  
 99 IBLA 159 (Sept. 29, 1987)

## TITLE 43: (Cont.)

sec. 1744(a)(2) --- 101 IBLA 70 (Jan. 29, 1988)  
 101 IBLA 202 (Feb. 22, 1988)  
 101 IBLA 272 (Mar. 10, 1988)  
 108 IBLA 121 (Mar. 30, 1989)  
 108 IBLA 347 (May 12, 1989)  
 111 IBLA 144 (Sept. 29, 1989)  
 1744(b) ----- 85 IBLA 23 (Jan. 30, 1985)  
 86 IBLA 85 (Apr. 11, 1985)  
 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 283 (May 13, 1985)  
 87 IBLA 55 (May 23, 1985)  
 87 IBLA 88 (May 30, 1985)  
 87 IBLA 102 (May 30, 1985)  
 87 IBLA 106 (May 30, 1985)  
 87 IBLA 113 (May 31, 1985)  
 87 IBLA 139 (June 10, 1985)  
 87 IBLA 161 (June 11, 1985)  
 87 IBLA 165 (June 12, 1985)  
 87 IBLA 172 (June 13, 1985)  
 87 IBLA 191 (June 13, 1985)  
 87 IBLA 204 (June 18, 1985)  
 87 IBLA 213 (June 18, 1985)  
 87 IBLA 223 (June 18, 1985)  
 87 IBLA 245 (June 19, 1985)  
 87 IBLA 249 (June 20, 1985)  
 87 IBLA 264 (June 24, 1985)  
 87 IBLA 293 (June 25, 1985)  
 87 IBLA 328 (June 26, 1985)  
 87 IBLA 345 (June 26, 1985)  
 87 IBLA 348 (June 26, 1985)  
 88 IBLA 1 (June 28, 1985)  
 88 IBLA 19 (July 1, 1985)  
 88 IBLA 36 (July 9, 1985)  
 88 IBLA 42 (July 10, 1985)  
 88 IBLA 45 (July 10, 1985)  
 88 IBLA 58 (July 17, 1985)  
 88 IBLA 114 (July 31, 1985)  
 88 IBLA 276 (Sept. 5, 1985)  
 88 IBLA 345 (Sept. 24, 1985)  
 88 IBLA 363 (Sept. 27, 1985)  
 88 IBLA 379 (Sept. 27, 1985)  
 89 IBLA 143 (Oct. 1, 1985)  
 89 IBLA 205 (Oct. 25, 1985)  
 89 IBLA 263 (Nov. 6, 1985)  
 89 IBLA 320 (Nov. 13, 1985)  
 89 IBLA 345 (Nov. 14, 1985)  
 90 IBLA 14 (Dec. 4, 1985)  
 90 IBLA 106 (Dec. 23, 1985)  
 90 IBLA 147 (Dec. 30, 1985)  
 90 IBLA 159 (Dec. 30, 1985)  
 90 IBLA 249 (Jan. 30, 1986)  
 90 IBLA 313 (Feb. 25, 1986)  
 90 IBLA 319 (Feb. 25, 1986)  
 90 IBLA 342 (Feb. 26, 1986)  
 91 IBLA 141 (Mar. 24, 1986)  
 91 IBLA 391 (Apr. 29, 1986)  
 92 IBLA 1 (Apr. 30, 1986)  
 92 IBLA 61 (May 19, 1986)  
 92 IBLA 87 (May 28, 1986)  
 92 IBLA 223 (June 23, 1986)  
 92 IBLA 228 (June 24, 1986)  
 92 IBLA 327 (June 27, 1986)  
 92 IBLA 358 (June 30, 1986)  
 93 IBLA 289 (Sept. 4, 1986)  
 93 IBLA 346 (Sept. 11, 1986)  
 94 IBLA 11 (Sept. 18, 1986)  
 94 IBLA 93 (Oct. 1, 1986)  
 94 IBLA 121 (Oct. 9, 1986)  
 94 IBLA 229 (Nov. 10, 1986)  
 94 IBLA 239 (Nov. 12, 1986)  
 94 IBLA 350 (Nov. 28, 1986)  
 95 IBLA 26 (Dec. 12, 1986)  
 95 IBLA 44 (Dec. 19, 1986)

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 96 IBLA 391 (Apr. 14, 1987)  
 97 IBLA 27 (Apr. 23, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 97 IBLA 259 (May 13, 1987)  
 97 IBLA 356 (May 26, 1987)  
 98 IBLA 100 (June 12, 1987)  
 98 IBLA 149 (June 22, 1987)  
 98 IBLA 358 (July 31, 1987)  
 99 IBLA 99 (Sept. 21, 1987)  
 99 IBLA 156 (Sept. 25, 1987)  
 99 IBLA 237 (Oct. 19, 1987)  
 99 IBLA 297 (Oct. 27, 1987)  
 100 IBLA 293 (Dec. 22, 1987)  
 101 IBLA 70 (Jan. 29, 1988)  
 101 IBLA 120 (Feb. 8, 1988)  
 104 IBLA 93 (Aug. 31, 1988)  
 104 IBLA 313 (Sept. 15, 1988)  
 104 IBLA 374 (Sept. 27, 1988)  
 105 IBLA 238 (Nov. 4, 1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 106 IBLA 317 (Jan. 6, 1989)  
 110 IBLA 20 (July 6, 1989)  
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 1744(c) ----- 86 IBLA 239 (Apr. 30, 1985)  
 86 IBLA 286 (May 13, 1985)  
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 87 IBLA 55 (May 23, 1985)  
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 87 IBLA 106 (May 30, 1985)  
 87 IBLA 113 (May 31, 1985)  
 87 IBLA 129 (June 6, 1985)  
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 87 IBLA 143 (June 10, 1985)  
 87 IBLA 158 (June 11, 1985)  
 87 IBLA 161 (June 11, 1985)  
 87 IBLA 165 (June 12, 1985)  
 87 IBLA 191 (June 13, 1985)  
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 87 IBLA 245 (June 19, 1985)  
 87 IBLA 249 (June 20, 1985)  
 87 IBLA 261 (June 21, 1985)  
 87 IBLA 266 (June 25, 1985)  
 87 IBLA 293 (June 25, 1985)  
 87 IBLA 306 (June 25, 1985)  
 87 IBLA 328 (June 26, 1985)  
 87 IBLA 345 (June 26, 1985)  
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 88 IBLA 1 (June 28, 1985)  
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 88 IBLA 19 (July 1, 1985)  
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 88 IBLA 54 (July 16, 1985)  
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 88 IBLA 114 (July 31, 1985)  
 88 IBLA 117 (July 31, 1985)  
 88 IBLA 123 (Aug. 1, 1985)  
 88 IBLA 276 (Sept. 5, 1985)  
 88 IBLA 296 (Sept. 13, 1985)  
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 88 IBLA 345 (Sept. 24, 1985)

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 88 IBLA 379 (Sept. 27, 1985)  
 89 IBLA 141 (Oct. 1, 1985)  
 89 IBLA 143 (Oct. 1, 1985)  
 89 IBLA 224 (Oct. 28, 1985)  
 90 IBLA 159 (Dec. 30, 1985)  
 90 IBLA 249 (Jan. 30, 1986)  
 90 IBLA 319 (Feb. 25, 1986)  
 90 IBLA 342 (Feb. 26, 1986)  
 91 IBLA 113 (Mar. 17, 1986)  
 91 IBLA 141 (Mar. 24, 1986)  
 92 IBLA 223 (June 23, 1986)  
 92 IBLA 327 (June 27, 1986)  
 93 IBLA 199 (Aug. 18, 1986)  
 93 IBLA 289 (Sept. 4, 1986)  
 94 IBLA 11 (Sept. 18, 1986)  
 94 IBLA 121 (Oct. 9, 1986)  
 94 IBLA 194 (Oct. 30, 1986)  
 94 IBLA 229 (Nov. 10, 1986)  
 94 IBLA 239 (Nov. 12, 1986)  
 95 IBLA 44 (Dec. 19, 1986)  
 95 IBLA 128 (Jan. 6, 1987)  
 95 IBLA 328 (Jan. 30, 1987)  
 96 IBLA 391 (Apr. 14, 1987)  
 97 IBLA 27 (Apr. 23, 1987)  
 97 IBLA 40 (Apr. 23, 1987)  
 97 IBLA 259 (May 13, 1987)  
 97 IBLA 356 (May 26, 1987)  
 98 IBLA 75 (June 9, 1987)  
 98 IBLA 209 (July 1, 1987)  
 98 IBLA 254 (July 7, 1987)  
 99 IBLA 156 (Sept. 25, 1987)  
 99 IBLA 159 (Sept. 29, 1987)  
 101 IBLA 1 (Jan. 20, 1988)  
 101 IBLA 70 (Jan. 29, 1988)  
 101 IBLA 106 (Feb. 2, 1988)  
 101 IBLA 120 (Feb. 8, 1988)  
 101 IBLA 202 (Feb. 22, 1988)  
 101 IBLA 272 (Mar. 10, 1988)  
 101 IBLA 399 (Apr. 4, 1988)  
 102 IBLA 212 (May 10, 1988)  
 102 IBLA 334 (June 3, 1988)  
 104 IBLA 9 (Aug. 15, 1988)  
 104 IBLA 93 (Aug. 31, 1988)  
 104 IBLA 374 (Sept. 27, 1988)  
 105 IBLA 44 (Oct. 17, 1988)  
 105 IBLA 90, 95 I.D. 219 (1988)  
 105 IBLA 282 (Nov. 7, 1988)  
 105 IBLA 290, 95 I.D. 242 (1988)  
 107 IBLA 47 (Jan. 27, 1989)  
 107 IBLA 287 (Feb. 23, 1989)  
 108 IBLA 121 (Mar. 30, 1989)  
 108 IBLA 152 (Apr. 7, 1989)  
 108 IBLA 247 (Apr. 24, 1989)  
 109 IBLA 1 (May 22, 1989)  
 109 IBLA 19 (May 24, 1989)  
 109 IBLA 69 (May 30, 1989)  
 109 IBLA 76 (May 30, 1989)  
 109 IBLA 85 (May 31, 1989)  
 109 IBLA 353 (June 23, 1989)  
 109 IBLA 357 (June 23, 1989)  
 110 IBLA 1 (July 5, 1989)  
 110 IBLA 144 (Aug. 10, 1989)  
 111 IBLA 144 (Sept. 29, 1989)  
 112 IBLA 130 (Nov. 30, 1989)  
 112 IBLA 160 (Dec. 11, 1989)  
 1745 ----- 86 IBLA 149 (Apr. 25, 1985)  
 87 IBLA 380 (June 28, 1985)  
 90 IBLA 293, 93 I.D. 66 (1986)  
 91 IBLA 108 (Mar. 14, 1986)  
 97 IBLA 126 (Apr. 30, 1987)  
 1745(a) ----- 90 IBLA 293, 93 I.D. 66 (1986)  
 97 IBLA 126 (Apr. 30, 1987)

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sec. 1745(c) ----- 97 IBLA 126 (Apr. 30, 1987)  
 1746 ----- 91 IBLA 108 (Mar. 14, 1986)  
 97 IBLA 253 (May 13, 1987)  
 101 IBLA 369 (Mar. 29, 1988)  
 102 IBLA 256, 95 I.D. 64 (1988)  
 105 IBLA 375 (Nov. 29, 1988)  
 107 IBLA 75 (Jan. 30, 1989)  
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 1751-1753 ---- 92 IBLA 200 (June 12, 1986)  
 96 IBLA 4 (Feb. 26, 1987)  
 97 IBLA 1 (Apr. 16, 1987)  
 1752(a) ----- 99 IBLA 137 (Sept. 25, 1987)  
 1752(c) ----- 93 IBLA 89 (July 22, 1986)  
 1761 ----- 87 IBLA 236 (June 19, 1985)  
 88 IBLA 31 (July 9, 1985)  
 89 IBLA 120 (Sept. 30, 1985)  
 94 IBLA 138 (Oct. 21, 1986)  
 95 IBLA 52 (Dec. 19, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 96 IBLA 193 (Mar. 19, 1987)  
 97 IBLA 45, 94 I.D. 139 (1987)  
 98 IBLA 139 (June 22, 1987)  
 100 IBLA 289 (Dec. 16, 1987)  
 101 IBLA 52 (Jan. 26, 1988)  
 104 IBLA 145 (Sept. 2, 1988)  
 105 IBLA 193 (Nov. 2, 1988)  
 105 IBLA 353 (Nov. 21, 1988)  
 106 IBLA 1 (Nov. 30, 1988)  
 107 IBLA 109 (Feb. 2, 1989)  
 108 IBLA 198 (Apr. 17, 1989)  
 109 IBLA 327 (June 22, 1989)  
 112 IBLA 239 (Dec. 21, 1989)  
 1761-1771 ---- 85 IBLA 389 (Mar. 27, 1985)  
 86 IBLA 258 (May 8, 1985)  
 88 IBLA 240 (Sept. 3, 1985)  
 92 IBLA 290 (June 26, 1986)  
 93 IBLA 293 (Sept. 4, 1986)  
 94 IBLA 261 (Nov. 17, 1986)  
 96 IBLA 193 (Mar. 19, 1987)  
 97 IBLA 45, 94 I.D. 139 (1987)  
 98 IBLA 143 (June 22, 1987)  
 98 IBLA 314 (July 30, 1987)  
 98 IBLA 372 (Aug. 3, 1987)  
 100 IBLA 289 (Dec. 16, 1987)  
 100 IBLA 306 (Dec. 23, 1987)  
 103 IBLA 162 (July 21, 1988)  
 104 IBLA 17 (Aug. 17, 1988)  
 104 IBLA 145 (Sept. 2, 1988)  
 105 IBLA 14 (Oct. 11, 1988)  
 105 IBLA 132 (Oct. 26, 1988)  
 105 IBLA 353 (Nov. 21, 1988)  
 106 IBLA 1 (Nov. 30, 1988)  
 106 IBLA 39 (Dec. 7, 1988)  
 107 IBLA 82 (Jan. 31, 1989)  
 109 IBLA 142 (June 28, 1989)  
 110 IBLA 213 (Aug. 21, 1989)  
 111 IBLA 255 (Oct. 25, 1989)  
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 1761(a) ----- 88 IBLA 31 (July 9, 1985)  
 91 IBLA 172 (Mar. 28, 1986)  
 94 IBLA 138 (Oct. 21, 1986)  
 94 IBLA 167 (Oct. 28, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 99 IBLA 37 (Sept. 8, 1987)  
 99 IBLA 327 (Oct. 29, 1987)  
 100 IBLA 257 (Dec. 9, 1987)  
 110 IBLA 67 (July 20, 1989)  
 1761(a)(1) --- 95 IBLA 225 (Jan. 16, 1987)  
 96 IBLA 193 (Mar. 19, 1987)  
 100 IBLA 289 (Dec. 16, 1987)  
 1761(a)(2) --- 97 IBLA 45, 94 I.D. 139 (1987)  
 1761(a)(5) --- 91 IBLA 399 (Apr. 30, 1986)  
 93 IBLA 310 (Sept. 11, 1986)



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sec. 1761(a)(5) --- 94 IBLA 167 (Oct. 28, 1986)  
 94 IBLA 381 (Dec. 5, 1986)  
 98 IBLA 275 (July 17, 1987)  
 106 IBLA 39 (Dec. 7, 1988)  
 1761(a)(6) --- 105 IBLA 50 (Oct. 17, 1988)  
 1761(b)(1) --- 94 IBLA 138 (Oct. 21, 1986)  
 105 IBLA 353 (Nov. 21, 1988)  
 1762(b) ----- 106 IBLA 1 (Nov. 30, 1988)  
 1762(c) ----- 89 IBLA 120 (Sept. 30, 1985)  
 1764 ----- 98 IBLA 275 (July 17, 1987)  
 1764(c) ----- 100 IBLA 257 (Dec. 9, 1987)  
 1764(e) ----- 104 IBLA 66 (Aug. 25, 1988)  
 1764(q) ----- 88 IBLA 240 (Sept. 3, 1985)  
 89 IBLA 120 (Sept. 30, 1985)  
 89 IBLA 276 (Nov. 8, 1985)  
 91 IBLA 82 (Mar. 11, 1986)  
 91 IBLA 131 (Mar. 20, 1986)  
 91 IBLA 399 (Apr. 30, 1986)  
 93 IBLA 310 (Sept. 11, 1986)  
 94 IBLA 261 (Nov. 17, 1986)  
 94 IBLA 381 (Dec. 5, 1986)  
 95 IBLA 225 (Jan. 16, 1987)  
 98 IBLA 139 (June 22, 1987)  
 98 IBLA 273 (Aug. 3, 1987)  
 98 IBLA 275 (July 17, 1987)  
 100 IBLA 289 (Dec. 16, 1987)  
 101 IBLA 248 (Feb. 29, 1988)  
 101 IBLA 252 (Feb. 29, 1988)  
 104 IBLA 145 (Sept. 2, 1988)  
 105 IBLA 14 (Oct. 11, 1988)  
 105 IBLA 132 (Oct. 26, 1988)  
 105 IBLA 193 (Nov. 2, 1988)  
 106 IBLA 379 (Jan. 19, 1989)  
 107 IBLA 109 (Feb. 2, 1989)  
 108 IBLA 195 (Apr. 13, 1989)  
 109 IBLA 142 (June 29, 1989)  
 109 IBLA 327 (June 22, 1989)  
 110 IBLA 213 (Aug. 21, 1989)  
 111 IBLA 69 (Sept. 22, 1989)  
 111 IBLA 255 (Oct. 25, 1989)  
 112 IBLA 239 (Dec. 21, 1989)  
 1764(h)(1) --- 100 IBLA 257 (Dec. 9, 1987)  
 1764(i) ----- 104 IBLA 145 (Sept. 2, 1988)  
 1766 ----- 15 IBLA 220, 94 I.D. 353 (1987)  
 85 IBLA 389 (Mar. 27, 1985)  
 98 IBLA 372 (Aug. 3, 1987)  
 112 IBLA 144 (Dec. 4, 1989)  
 1768 ----- 86 IBLA 268 (May 10, 1985)  
 89 IBLA 323, 92 I.D. 578 (1985)  
 100 IBLA 318 (Dec. 31, 1987)  
 105 IBLA 50 (Oct. 17, 1988)  
 1769 ----- 108 IBLA 130 (Apr. 3, 1989)  
 M-36964, 96 I.D. 439 (1989)  
 1769(a) ----- 88 IBLA 106 (July 23, 1985)  
 104 IBLA 66 (Aug. 25, 1988)  
 1770 ----- M-36964, 96 I.D. 439 (1989)  
 1770(a) ----- 97 IBLA 45, 94 I.D. 139 (1987)  
 110 IBLA 67 (July 20, 1989)  
 1781 ----- 86 IBLA 164 (Apr. 25, 1985)  
 90 IBLA 221 (Jan. 30, 1986)  
 91 IBLA 309 (Apr. 15, 1986)  
 1781(f) ----- 86 IBLA 164 (Apr. 25, 1985)  
 1782 ----- 86 IBLA 89 (Apr. 12, 1985)  
 90 IBLA 221 (Jan. 30, 1986)  
 92 IBLA 333 (June 30, 1986)  
 94 IBLA 115 (Oct. 9, 1986)  
 96 IBLA 260 (Mar. 26, 1987)  
 101 IBLA 18 (Jan. 25, 1988)  
 108 IBLA 277 (Apr. 26, 1989)  
 109 IBLA 274 (June 20, 1989)  
 111 IBLA 122 (Sept. 29, 1989)  
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sec. 1782(a) ----- 85 IBLA 54 (Feb. 11, 1985)  
 85 IBLA 112 (Feb. 14, 1985)  
 90 IBLA 221 (Jan. 30, 1986)  
 91 IBLA 124 (Mar. 19, 1986)  
 92 IBLA 333 (June 30, 1986)  
 94 IBLA 115 (Oct. 9, 1986)  
 98 IBLA 164 (June 24, 1987)  
 100 IBLA 63 (Nov. 30, 1987)  
 102 IBLA 385 (June 17, 1988)  
 109 IBLA 274 (June 20, 1989)  
 111 IBLA 251 (Oct. 25, 1989)  
 1782(b) ----- 85 IBLA 54 (Feb. 11, 1985)  
 109 IBLA 274 (June 20, 1989)  
 1782(c) ----- 90 IBLA 221 (Jan. 30, 1986)  
 92 IBLA 333 (June 30, 1986)  
 94 IBLA 115 (Oct. 9, 1986)  
 96 IBLA 294 (Mar. 31, 1987)  
 98 IBLA 164 (June 24, 1987)  
 98 IBLA 314 (July 30, 1987)  
 100 IBLA 63 (Nov. 30, 1987)  
 101 IBLA 18 (Jan. 25, 1988)  
 102 IBLA 385 (June 17, 1988)  
 103 IBLA 308 (Aug. 4, 1988)  
 105 IBLA 44 (Oct. 17, 1988)  
 105 IBLA 196 (Nov. 2, 1988)  
 106 IBLA 46 (Dec. 8, 1988)  
 106 IBLA 93 (Dec. 13, 1988)  
 111 IBLA 122 (Sept. 29, 1989)  
 111 IBLA 251 (Oct. 25, 1989)  
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 4321-4347 ---- 98 IBLA 143 (June 22, 1987)  
 4332(c) ----- 88 IBLA 133 (Aug. 9, 1985)  
 4332(2)(C) --- 91 IBLA 305 (Apr. 15, 1986)  
 4601-6a(c) --- 95 IBLA 90 (Dec. 29, 1986)  
 4601-6a(d) --- 95 IBLA 90 (Dec. 29, 1986)

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 1507 ----- 85 IBLA 374 (Mar. 26, 1985)  
 85 IBLA 394 (Mar. 28, 1985)  
 86 IBLA 131 (Apr. 22, 1985)  
 86 IBLA 242 (Apr. 30, 1985)  
 87 IBLA 249 (June 20, 1985)  
 88 IBLA 168 (Aug. 19, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 91 IBLA 268 (Apr. 11, 1986)  
 91 IBLA 387 (Apr. 28, 1986)  
 92 IBLA 87 (May 28, 1986)  
 92 IBLA 223 (June 23, 1986)  
 92 IBLA 378 (July 8, 1986)  
 93 IBLA 267 (Aug. 29, 1986)  
 94 IBLA 212 (Nov. 5, 1986)  
 95 IBLA 63 (Dec. 19, 1986)  
 95 IBLA 140 (Jan. 12, 1987)  
 95 IBLA 300 (Jan. 29, 1987)  
 97 IBLA 96 (Apr. 29, 1987)  
 97 IBLA 314 (May 19, 1987)  
 98 IBLA 143 (June 22, 1987)  
 98 IBLA 391 (Aug. 5, 1987)  
 99 IBLA 170 (Oct. 2, 1987)  
 99 IBLA 387 (Nov. 10, 1987)  
 100 IBLA 37 (Nov. 19, 1987)  
 101 IBLA 293 (Mar. 15, 1988)  
 103 IBLA 341 (Aug. 9, 1988)  
 106 IBLA 304 (Jan. 5, 1989)  
 107 IBLA 71 (Jan. 30, 1989)  
 109 IBLA 69 (May 30, 1989)  
 109 IBLA 270 (June 16, 1989)  
 109 IBLA 357 (June 23, 1989)  
 1510 ----- 87 IBLA 249 (June 20, 1985)  
 88 IBLA 341 (Sept. 19, 1985)  
 91 IBLA 387 (Apr. 28, 1986)

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sec. 1510 ----- 92 IBLA 87 (May 28, 1986)  
92 IBLA 223 (June 23, 1986)  
92 IBLA 378 (July 8, 1986)  
93 IBLA 267 (Aug. 29, 1986)  
94 IBLA 212 (Nov. 5, 1986)  
95 IBLA 140 (Jan. 12, 1987)  
97 IBLA 96 (Apr. 29, 1987)  
98 IBLA 143 (June 22, 1987)  
100 IBLA 37 (Nov. 19, 1987)  
101 IBLA 256 (Mar. 2, 1988)  
103 IBLA 341 (Aug. 9, 1988)  
109 IBLA 69 (May 30, 1989)  
109 IBLA 254 (June 16, 1989)  
109 IBLA 270 (June 16, 1989)  
109 IBLA 357 (June 23, 1989)

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sec. 357 ----- 13 IBIA 200 (July 19, 1985)  
364a-364e --- 89 IBLA 369, 92 I.D. 606 (1985)

## TITLE 49:

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## TITLE 50:

525 ----- 13 IBIA 307 (Oct. 29, 1985)

# ACCOUNTS

(See also Fees, Funds, Payments--if included in this Index.)

## GENERALLY

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. An order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 215 (Nov. 5, 1986)

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

# ACCOUNTS--Continued

## DISTRIBUTION OF RECEIPTS

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

## FEES AND COMMISSIONS

It is proper for BLM to reject a simultaneous oil and gas lease application submitted with uncollectible filing fees. 43 CFR 3112.2-2(c) (1982) disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition precedent to further participation in the simultaneous leasing program.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

ACCOUNTS--Continued

## FEES AND COMMISSIONS--Continued

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

ACCOUNTS--Continued

## FEES AND COMMISSIONS--Continued

There is no authority for BLM to refund the adoption fee required under 43 CFR 4750.4-2 when the adopter takes custody of a wild horse, but fails to comply with the terms of the private maintenance and care agreement and governing regulations, thereby justifying BLM in terminating the agreement and reposessing the horse.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

## PAYMENTS

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition



ACCOUNTS--ContinuedPAYMENTS--Continued

for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

Richard G. Fowler, 89 IBLA 175 (Oct. 11, 1985)

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

ACCOUNTS--ContinuedPAYMENTS--Continued

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

Under 43 U.S.C. § 1337(g)(2), the Department is not required to invest a state's share of revenues. It may instead disburse them to the state as soon as they have been transferred from the Treasury's general suspense account to the special account created by sec. 1337(g)(2).

Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act, M-36956 (Jan. 14, 1988) 95 I.D. 203

The holder of an Outer Continental Shelf oil and gas lease who timely pays royalty in kind, rather than in money, may not be assessed a late fee pursuant to 30 CFR 218.150(d), even if it failed to accurately report the volume of the production with the result that the United States failed to collect the proper amount of money when it sold that production to third parties.

Mobil Oil Corp., Mobil Oil Exploration & Producing Southeast Inc., 107 IBLA 332 (Mar. 14, 1989)

The Minerals Management Service is authorized to impose late payment charges or exact interest as compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

ACCOUNTS--ContinuedREFUNDS

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 384 (Apr. 28, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, R. B. Allsup, 92 IBLA 197 (June 12, 1986)

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required \* \* \* by applicable law" under 43 U.S.C. § 1734(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986)  
93 I.D. 285

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

ACCOUNTS--ContinuedREFUNDS--Continued

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

Where a noncompetitive oil and gas lease is terminated for failure to timely make annual rental payments, and rental payments are made after the termination pending a BLM decision on a petition seeking class I reinstatement of the lease, BLM may properly return the rentals as excess payments pursuant to 43 U.S.C. § 1734(c) (1982), once it denies the reinstatement petition. However, in the absence of statutory provisions, no interest may be paid by the Government on such refunds.

Amoco Production Co., 101 IBLA 152 (Feb. 9, 1988)

Where the evidence establishes that a high bidder predicated his bid at a competitive oil and gas lease sale upon a BLM memorandum which erroneously reported the amount of funds held in an escrow account attributable to the subject parcel, the Board will rescind the offer and direct BLM to refund appellant's bid deposit.

C. Craig Folsom, 101 IBLA 198 (Feb. 22, 1988)

MMS is not bound by the terms of a consent agreement in which the lessee and the Department of Energy settle all claims and disputes with regard to overcharges in sales of crude oil. MMS properly ordered the lessee to pay the amount, plus late payment charges, which the lessee had withheld from royalty payments as representing MMS' proportionate share of the settlement amount contained in the consent agreement.

Although MMS is not bound by the terms of a consent agreement in which the lessee and the Department of Energy settle all claims and disputes with regard

ACCOUNTS--ContinuedREFUNDS--Continued

to overcharges in sales of crude oil from numerous leases, including a Federal lease, the Board will set aside MMS' denial of the lessee's request for a refund of the overcharge allocable to the Federal lease and remand the case for a determination of whether the lessee can show, independently of the consent agreement, whether it is entitled to a refund under 43 U.S.C. § 1734(c) (1982).

Union Texas Petroleum Corp., 103 IBLA 241 (July 26, 1988)

Refunds of advance rental payments tendered in connection with noncompetitive oil and gas lease offers which are rejected, are properly issued to an offeror pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982). However, in absence of statutory provisions, no interest may be paid by the Government on such refunds.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

One filing a request for repayment of excess royalties, paid with respect to gas produced from a particular Outer Continental Shelf oil and gas lease, is not precluded by the 2-year filing provision in sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1982) from recovering monies paid when the request was filed within the 2-year period but failed to correctly identify the lease and the amount paid.

Chevron U.S.A. Inc., 105 IBLA 21 (Oct. 12, 1988)

It was proper for BLM to cancel a sale of public land following acceptance of high bids when the sale was found to be contrary to an injunction entered in Nat'l Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). In such case a refund of deposits submitted with the high bids was proper. However, in the

ACCOUNTS--ContinuedREFUNDS--Continued

absence of express statutory authority, no interest on the funds deposited may be paid by BLM.

Gordon L. Hardy, 106 IBLA 227 (Dec. 27, 1988)

There is no authority for BLM to refund the adoption fee required under 43 CFR 4750.4-2 when the adopter takes custody of a wild horse, but fails to comply with the terms of the private maintenance and care agreement and governing regulations, thereby justifying BLM in terminating the agreement and reposessing the horse.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

ACCRETION  
(See also Boundaries, Public Lands--if included in this Index.)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

In apportioning accreted lands between adjoining sections, BLM properly disregards partition lines previously determined by proportioning the new frontage between two zero accretion points, one of which is within an area which has subsequently been determined to have formed through the process of avulsion.

In apportioning accreted land between adjoining sections, BLM is not required to use a privately surveyed partition line established by the perpendicular method where the private surveyor had no adequate justification for not employing the proportionate



ACCRETION--Continued

shoreline method and, thus, the line was not within the allowable limit of error.

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor),  
110 IBLA 25 (July 7, 1989)

ACQUIRED LANDS

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)  
Ted Thompson, 98 IBLA 251 (July 7, 1987)

Lands which were acquired under the Weeks Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 22 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 475, 478 (1982).

Melvin Franzen, H. Diane Golby, 92 IBLA 20 (May 6, 1986)

ACQUIRED LANDS--Continued

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific legislative or other authoritative direction to the contrary is not subject to leasing under the mineral leasing laws until the Department formally opens such land for disposition.

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

ACT OF FEBRUARY 8, 1887

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the



ACT OF FEBRUARY 8, 1887--Continued

vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982) nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

Where BLM has classified certain lands for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), and issued a certificate of allotment, it may establish a reasonable time in which the allottee must demonstrate settlement of the land in question. Two years from issuance of the certificate is such a reasonable time.

Where lands are classified for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), as irrigable lands and a certificate of allotment issued, settlement of those lands must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

ACT OF MARCH 3, 1891

BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such

ACT OF MARCH 3, 1891--Continued

cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr. et al., 87 IBLA 236 (June 19, 1985)

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed and gives the patentee the protection of a judicial forum.

A protest of the acceptance of a notice of location of a homestead which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

A field investigation report prepared by BLM is not a protest.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

ACT OF AUGUST 18, 1894

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Harlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37  
(Dec. 15, 1986)

ACT OF JUNE 4, 1897

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ACT OF MAY 14, 1898

Trapping is not a qualifying use of land under the Act of May 14, 1898, which will support a trade and manufacturing site claim; instead, trapping is a use appropriate to acquisition of a headquarters' site, pursuant to the Act of Mar. 3, 1927. 43 U.S.C. § 687a (1982).

Because sec. 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, repealed the trade and manufacturing site and headquarters' site law, effective Oct. 21, 1986, no new claim may be initiated under that law on or after that date.

Jack Kim, Francoise Kim, 103 IBLA 104 (July 13, 1988)

ACT OF JUNE 17, 1902

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

ACT OF JUNE 8, 1906

The Antiquities Act is not self-executing and does not withdraw land other than by a formal determination issued by Presidential proclamation affecting a specific parcel of land.

A person who makes an "appropriation" of land by complying with the public land laws does not, by this action alone, "appropriate" under 16 U.S.C. § 433 (1982), objects of antiquity which may exist on that land.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

ACT OF JUNE 25, 1910

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

ACT OF AUGUST 24, 1912

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation,

ACT OF AUGUST 24, 1912--Continued

and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

ACT OF DECEMBER 19, 1913

Where nothing in the Raker Act, 38 Stat. 242 (1913), precludes the City of San Francisco's arrangement for disposal of Hetch Hetchy power as embodied in its contracts with Pacific Gas and Electric and with Modesto and Turlock Irrigation Districts.

Compliance with Raker Act by City & County of San Francisco, M-36962 (Nov. 10, 1988) 96 I.D. 302

ACT OF JULY 17, 1914

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986) 93 I.D. 66

ACT OF SEPTEMBER 19, 1914

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as

ACT OF SEPTEMBER 19, 1914--Continued

these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

ACT OF DECEMBER 29, 1916

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

Adjudication of a mineral claimant's bond pursuant to 43 U.S.C. § 299 (1982), does not require a formal hearing on the record in conformity to provisions of the Administrative Procedure Act, 5 U.S.C. § 557 (1982). The landowner's rights to notice and an opportunity to be heard concerning the adequacy of the bond furnished to protect his rights as a property owner are safeguarded by the right of appeal to this Board.

A mineral claimant's bond given to enable mining on land patented under the Stock-Raising Homestead Act must be executed by all mineral claimants seeking to re-enter the patented lands.

A mineral claimant's bond must identify the claims sought to be entered by a mineral claimant seeking to re-enter SHRA lands, so as to permit BLM to determine possible damages to crops, surface improvements, and the grazing value of the land within those claims.

Brock Livestock Co., Inc., 101 IBLA 91 (Feb. 2, 1988)



ACT OF DECEMBER 29, 1916--Continued

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the mineral claimant's proposed activities on the patented lands.

William & Pearl Hayes, 101 IBLA 110 (Feb. 2, 1988)

ACT OF FEBRUARY 25, 1920

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

ACT OF MARCH 3, 1927

Trapping is not a qualifying use of land under the Act of May 14, 1898, which will support a trade and manufacturing site claim; instead, trapping is a use appropriate to acquisition of a headquarters' site, pursuant to the Act of Mar. 3, 1927. 43 U.S.C. § 687a (1982).

Because sec. 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, repealed the trade and manufacturing site and headquarters' site law, effective Oct. 21, 1986, no new claim may be initiated under that law on or after that date.

Jack Kim, Francoise Kim, 103 IBLA 104 (July 13, 1988)

ACT OF MARCH 4, 1927

Lands leased under the Act of Mar. 4, 1927, are not subject to settlement, location, and acquisition under the nonmineral land laws applicable to Alaska unless and until the authorized officer determines that the grazing lease should be canceled or reduced.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

ACT OF MAY 21, 1930

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

ACT OF APRIL 23, 1932

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness



ACT OF APRIL 23, 1932--Continued

to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Hardes Mining Co., 102 IBLA 169 (May 3, 1988)

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance

ACT OF APRIL 23, 1932--Continued

of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154 (Sept. 6, 1988) 95 I.D. 142

ACT OF AUGUST 13, 1946

The Indian Claims Commission was established by the Act of Aug. 13, 1946, 60 Stat. 1049, to compensate Indian tribes through the payment of money damages for past wrong doings by the United States. Until 1946 Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress. The Commission was authorized to hear all tribal claims against the United States that existed before Aug. 13, 1946. The Pueblo of Sandia did not participate in any proceedings before the Commission in reference to the lands involved here thus letting the statute of limitations run.

Pueblo of Sandia Boundary, M-36963 (Dec. 9, 1988) 96 I.D. 331

ACT OF JULY 31, 1947

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

ACT OF AUGUST 24, 1954

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

Finley F. Martin, John C. Martin, 86 IBLA 254 (May 3, 1985)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), must be remanded to BLM where the applicants claim to have fully complied with the 1954 Act, but where their application was rejected for failure to comply with provisions of another statute, the Act of Dec. 22, 1928, the Color of Title Act, 43 U.S.C. § 1068 (1982).

Victor A. Markunas, Victoria E. Markunas, 101 IBLA 187 (Feb. 17, 1988)

ACT OF AUGUST 11, 1955

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

ACT OF AUGUST 11, 1955--Continued

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately

ACT OF AUGUST 11, 1955--Continued

prior to mining, there shall be a bond to insure reclamation.

United States Forest Service v. Walter D. Milender, 155 I04 IBLA 207 (Sept. 12, 1988) 95 I.D. 155

ACT OF AUGUST 1, 1956

Equitable title vests in preference right applicants for public lands, restored in accordance with 43 U.S.C. § 971a - e (1982) and Public Land Order No. 1613, when they have paid the purchase price and received a receipt from BLM, and BLM may properly grant them patents even though they have subsequently sold the lands adjoining the public lands.

Robert & Patricia Bailey et al., 89 IBLA 369 (Nov. 22, 1985) 92 I.D. 606

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

ACT OF AUGUST 27, 1958

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

ACT OF JULY 6, 1960

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions

ACT OF JULY 6, 1960--Continued

therein. The Department is bound to follow those provisions.

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ACT OF DECEMBER 24, 1970

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration



ACT OF DECEMBER 24, 1970--Continued

are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985)

ACT OF JANUARY 2, 1976

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987)  
94 I.D. 422

ACT OF OCTOBER 21, 1976

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

ACT OF OCTOBER 30, 1978

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, *inter alia*, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

ACT OF SEPTEMBER 28, 1984

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)



# ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior--if included in this Index.)

## GENERALLY

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the

# ADMINISTRATIVE AUTHORITY--Continued

## GENERALLY--Continued

authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

A presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

ADMINISTRATIVE AUTHORITY--ContinuedGENERALLY--Continued

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

The Board of Land Appeals must defer to policies announced by the Secretary of the Interior.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

ADMINISTRATIVE AUTHORITY--ContinuedGENERALLY--Continued

The Office of Surface Mining Reclamation and Enforcement has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in 30 U.S.C. § 1267(a) (1982). In regard to inspections, the only issue as to "subject matter jurisdiction" would be a claim that the site inspected is outside the scope of the Surface Mining Control and Reclamation Act of 1977 because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

A BLM instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 4601-18(c) (1982), cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

ADMINISTRATIVE AUTHORITY--ContinuedGENERALLY--Continued

The Secretary has the authority to issue corrective patents when necessary to eliminate errors. A party seeking a corrective patent initiates the proceeding by filing an application asserting ownership of lands described in and based upon a patent or other document containing an alleged error. However, when the error does not lie in the patent or other document under which the applicant is asserting ownership, but lies in a patent issued to another party, the Secretary does not have authority to correct the other party's patent.

Genaro M. Roybal, 107 IBLA 75 (Jan. 30, 1989)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznookwo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

ADMINISTRATIVE AUTHORITY--ContinuedGENERALLY--Continued

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

BLM instruction memoranda are merely for internal use by BLM employees. Such documents are not regulations and do not have legal force or effect.

Beard Oil Co., 111 IBLA 191 (Oct. 10, 1989)

ESTOPPEL

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept



ADMINISTRATIVE AUTHORITY--ContinuedESTOPPEL--Continued

as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986) 93 I.D. 394

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

ADMINISTRATIVE AUTHORITY--ContinuedESTOPPEL--Continued

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

Even though the elements necessary for invoking estoppel against the United States may be present, estoppel will not lie if to do so would interfere with underlying Government policies or unduly undermine the enforcement of a particular law or regulation. An approval of an assignment of grazing rights within the Capitol Reef National Park to a party not an heir of the holder of those rights on Dec. 18, 1971, contrary to the express provisions of 16 U.S.C. § 273b (1982), may be rescinded after a lapse of 9 years, as the Bureau of Land Management had no authority to approve such assignment, and to do so would be directly contrary to the intent of Congress when establishing the park.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)

Failure to specifically exclude a category of leases in a Notice to Lessee or Notice to Payors stating that royalties were not required for "oil and gas used for production purposes on OCS oil and gas leases" is not affirmative misconduct that will support estoppel against the Government.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not



ADMINISTRATIVE AUTHORITY--ContinuedESTOPPEL--Continued

estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

LACHES

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglect of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

ADMINISTRATIVE PRACTICE

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board

ADMINISTRATIVE PRACTICE--Continued

will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

While, as a general rule, amendments to regulations or administrative procedures may be applied to a pending appeal where to do so would benefit an appellant, such amended regulations or procedures may not be applied where third-party rights would be adversely affected.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985)  
92 I.D. 293

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

ADMINISTRATIVE PRACTICE--Continued

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

ADMINISTRATIVE PRACTICE--Continued

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of the notice as required by 43 CFR 3112.6-1(a). Delivery of such documents after regular business hours on the date they were required to have been filed does not constitute compliance with the 30-day requirement in 43 CFR 3112.6-1(a) where the documents are deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day.

Santa Fe Energy Co., 102 IBLA 393 (June 21, 1988)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

ADMINISTRATIVE PRACTICE--Continued

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice--if included in this Index.)

## GENERALLY

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985) 92 I.D. 293

ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

The hearing requirement mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), does not apply where the Bureau of Land Management has not concluded that a Native allotment application contains insufficient proof of qualifying use and occupancy of the claimed lands and has not determined to reject the application.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and



ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986) 93 I.D. 6

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended.



ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)  
94 I.D. 132

ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

When there is no dispute as to material facts, an appellant's due process rights are satisfied by an appeal to the Board of Land Appeals.

Henry Deaton, 101 IBLA 177 (Feb. 17, 1988)

The Board of Land Appeals has jurisdiction to review a decision by BLM not to prepare a supplemental environmental impact statement pursuant to 40 CFR 1502.9(c)(1)(ii).

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600.

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction. The Board will not consider challenges to policy statements issued by BLM, or give opinions on abstract propositions.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

If an appellant's notice of appeal did not include a statement of reasons for the appeal, under 43 CFR 4.412(a), the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. However, under 43 CFR 4.22(f), the Board may extend the time for filing a statement of reasons. Under 43 CFR 4.402(a), failure to file the statement of reasons within the time allowed (either by 43 CFR 4.412(a), or by the Board in an order granting an extension) subjects the appeal to summary dismissal. Where no statement of reasons is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Robert L. True (d.b.a. Comanche Enterprises), Petroleum Research Corp., et al., SATELLITE 8303116, 101 IBLA 320 (Mar. 17, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedGENERALLY--Continued

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving an attorney's contract is final for purposes of judicial review.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

An assessment of late payment charges by MMS cannot be affirmed if the administrative record submitted to the Board of Land Appeals by the Director, MMS, does not contain documents conclusively showing that the lessee failed to pay royalty timely. In the absence of the original payment vouchers duly date stamped to show when they were received (or other suitable proof), it cannot be found through the presumption of regularity that they were not timely filed.

When a notice of appeal to the Board of Land Appeals is filed from a decision of the Director, MMS, MMS is required to submit the complete original casefile, containing all documents relating to the dispute at hand. Failure to include documents establishing relevant facts may prevent the Board from affirming the decision on appeal.

Dugan Production Corp., 103 IBLA 362 (Aug. 11, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedGENERALLY--Continued

A "petition to intervene" in a pending appeal is properly denied where the party seeking to participate does not offer comments on the decision on appeal, but instead challenges an earlier decision by BLM that has been previously considered by the Board of Land Appeals.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

A decision rejecting an application for conveyance of Federally owned mineral interests under sec. 209(b) of FLPMA because of a finding that the lands applied for have "known mineral values" must be supported by facts of record. If the finding is based solely on an uncorroborated, conclusory memorandum, the decision will be set aside and the matter remanded for readjudication.

Wayne D. Klump et al., 104 IBLA 164 (Sept. 6, 1988)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that even assuming everything the appellant alleges is true, under no set of circumstances can the appellant prevail, the notice will be addressed without additional briefing.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

James C. Mackey, 104 IBLA 393 (Oct. 4, 1988)

ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors)  
106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982).

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant is not entitled, as a matter of law, to a Native allotment.

Jonas Ningboek, 109 IBLA 347 (June 23, 1989)

ADMINISTRATIVE PROCEDURE--Continued

## GENERALLY--Continued

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

A person with no legal status in an appeal will not be heard to object to a settlement agreement reached between the parties.

San Juan County, Washington v. Portland Area Director, Bureau of Indian Affairs, 18 IBLA 12 (Oct. 5, 1989)

## ADJUDICATION

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

The final ruling of a Government contest of unpatented mining claims which are the subject of amended locations where the claims were declared null and void for lack of discovery of a valuable mineral deposit, which declaration was sustained on appeal, will not be applied to amended locations where the record shows that these amended locations were specifically excluded from the contest action.

Jon Zimmers, 90 IBLA 106 (Dec. 23, 1985)



ADMINISTRATIVE PROCEDURE--ContinuedADJUDICATION--Continued

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Agnes Mayo Moore, 91 IBLA 343 (Apr. 21, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

ADMINISTRATIVE PROCEDURE--ContinuedADJUDICATION--Continued

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

When a party to an adversary proceeding within the Department and a Departmental agency acting through its attorneys in the Office of the Solicitor reach and sign a compromise agreement concerning that proceeding and an Administrative Law Judge issues a consent decision approving that agreement, the parties are bound to the terms of the agreement as a matter of contract.

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of compelling equitable or legal reasons why the dismissal should be set aside.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)



ADMINISTRATIVE PROCEDURE--ContinuedADJUDICATION--Continued

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

The jurisdiction of the Board of Land Appeals has been delegated by the Secretary of the Interior, and the scope of this Board's authority is stated in 43 CFR Part 4. The Board has not been empowered to rule on the merits of an affirmative defense that an applicant is protected under the bankruptcy laws because debt claims were not filed as Proof of Claim with the U.S. Bankruptcy Court. The Bankruptcy Court is the proper forum for a determination on that issue.

Lomax Exploration Co., 105 IBLA 1 (Oct. 7, 1988)

A MMS decision that interprets a Notice to Lessees as excluding a category of leases is an adjudication and need not be adopted in accordance with notice-and-comment rulemaking procedures with 5 U.S.C. § 553 (1982).

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

An instruction memorandum is merely a document for internal use by BLM employees and has no legal force or effect. It is not directed to outside parties and neither initiates or disposes of an individual case, so it is not a "decision" subject to appeal under 43 CFR 4.410.

State of Alaska, 106 IBLA 160 (Dec. 20, 1988)  
95 I.D. 304

ADMINISTRATIVE PROCEDURE--ContinuedADJUDICATION--Continued

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

ADMINISTRATIVE LAW JUDGES

In an appeal arising from a decision by an Administrative Law Judge, the Board of Land Appeals may make findings of fact and conclusions based upon the record on appeal. The entire record before the Board may be considered in determining whether the decision appealed from is in error, and an appropriate order entered.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Where the Administrative Law Judge who hears the case becomes unavailable to the agency, and the testimony involves neither conflicting facts nor credibility of the witnesses, writing of the decision by a different Administrative Law Judge is not error.

Paul Asper v. U.S. Fish & Wildlife Service, 6 OHA 86 (Nov. 8, 1985)

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987)  
94 I.D. 181

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE LAW JUDGES--Continued

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

A decision by an Administrative Law Judge who did not preside over a hearing in a mining claim contest will not be overturned for that reason where an evaluation of the credibility of witnesses was not a material factor in reaching the decision.

United States v. Jean M. McMullin, David S. McMullin, 102 IBLA 276 (May 24, 1988)

In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias or misconduct, a substantial showing of such bias or misconduct must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE PROCEDURE ACT

In a grazing trespass case initiated by BLM upon an order to show cause, the burden of proof is properly placed upon BLM as the proponent of the order sought to establish by substantial evidence the occurrence of cattle trespass.

Where on appeal BLM challenges findings made by an Administrative Law Judge on grounds that his findings concerning credibility of witnesses are inadequate to justify the decision as announced, the Board of Land Appeals will examine the record to determine whether, on the basis of all evidence, the findings made by the fact-finder are supported by credible testimony.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Where the Administrative Law Judge who hears the case becomes unavailable to the agency, and the testimony involves neither conflicting facts nor credibility of the witnesses, writing of the decision by a different Administrative Law Judge is not error.

Paul Asper v. U.S. Fish & Wildlife Service, 6 OHA 86 (Nov. 8, 1985)

A decision of this Board is an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. § 554 (1982).

Benton C. Cavin, 93 IBLA 211 (Aug. 20, 1986)

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE PROCEDURE ACT--Continued

order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979).

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)  
94 I.D. 69

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

JN Oil & Gas, 101 IBLA 394 (Apr. 1, 1988)

Except in cases of willfulness or where public health, interest, or safety required otherwise, 5 U.S.C. § 558(c) (1982), dictates that, prior to institution of proceedings to revoke an Indian trader's license, the licensee must be given written notice of the facts or conduct that may warrant revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements.

For purposes of the procedural requirements concerning license revocation in 5 U.S.C. § 558(c) (1982), a finding that a licensed Indian trader acted willfully requires evidence that he acted intentionally or with careless disregard of agency requirements.

Elias H. Attea, Jr. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 16 IBIA 138 (June 6, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE PROCEDURE ACT--Continued

A MMS decision that interprets a Notice to Lessees as excluding a category of leases is an adjudication and need not be adopted in accordance with notice-and-comment rulemaking procedures with 5 U.S.C. § 553 (1982).

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

Appellant's argument that promulgation of late payment interest assessment regulations failed to comply with the notice and comment provisions of 5 U.S.C. § 553 (1982), is moot as the appropriate remedy has already been provided.

Mesa Petroleum Co., 111 IBLA 201 (Oct. 12, 1989)

ADMINISTRATIVE RECORD

Under 43 CFR 3112.0-5 and 3112.2-4, any simultaneous oil and gas applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program must indicate on the lease application the name of the party or



ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE RECORD--Continued

filing service that provided assistance. Where an applicant admits that he has received such assistance and has not so indicated on Part B of his application, his application is properly rejected.

Robert R. Shrode, 89 IBLA 186 (Oct. 17, 1985)

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

An assessment of late payment charges by MMS cannot be affirmed if the administrative record submitted to the Board of Land Appeals by the Director, MMS, does not contain documents conclusively showing that the lessee failed to pay royalty timely. In the absence of the original payment vouchers duly date stamped to show when they were received (or other suitable proof), it cannot be found through the presumption of regularity that they were not timely filed.

When a notice of appeal to the Board of Land Appeals is filed from a decision of the Director, MMS, MMS is required to submit the complete, original casefile, containing all documents relating to the dispute at hand. Failure to include documents establishing relevant facts may prevent the Board from affirming the decision on appeal.

Dugan Production Corp., 103 IBLA 362 (Aug. 11, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE RECORD--Continued

A decision rejecting an application for conveyance of Federally owned mineral interests under sec. 209(b) of FLPMA because of a finding that the lands applied for have "known mineral values" must be supported by facts of record. If the finding is based solely on an uncorroborated, conclusory memorandum, the decision will be set aside and the matter remanded for readjudication.

Wayne D. Klump et al., 104 IBLA 164 (Sept. 6, 1988)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Cecilia Plain Feather v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBLA 26 (Oct. 20, 1989)



ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE RECORD--Continued

When the administrative record fails to demonstrate that an applicant was clearly advised of the necessity to provide particular information in a grant application, and the applicant's failure to provide that information could have affected the decision on whether to approve the application, a decision denying the application will be vacated and the matter remanded for development of an adequate record and issuance of a new decision.

Delaware Tribe of Western Oklahoma v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 98 (Dec. 27, 1989)

ADMINISTRATIVE REVIEW

Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBIA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions.

State of Alaska, 85 IBIA 170 (Feb. 26, 1985)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

Where the facts and law are comprehensively set forth in an Administrative Law Judge's decision recommending reversal of easements reserved under authority of sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Chitina Native Corp., 85 IBIA 311 (Mar. 21, 1985)

Where the facts and the law are properly set forth in an Administrative Law Judge's decision recommending affirming a BLM decision to reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Tetlin Native Corp., 86 IBIA 325 (May 16, 1985)

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal and a motion to assume jurisdiction, or other document requesting Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to trigger the Board's jurisdiction automatically after the expiration of the time period.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 2, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

ADMINISTRATIVE PROCEDURE--Continued

## ADMINISTRATIVE REVIEW--Continued

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35  
96 IBLA 19 (Feb. 26, 1987)

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987)  
94 I.D. 172

Departmental regulation 43 CFR 3833.0-5(m), promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S. 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

ADMINISTRATIVE PROCEDURE--Continued

## ADMINISTRATIVE REVIEW--Continued

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63  
(Nov. 30, 1987)

A BLM decision to designate certain roads within the King Range National Conservation Area as open to unrestricted or limited vehicle use by the general public will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. However, where a portion of the King Range has been designated a wilderness study area, relevant factors for consideration of whether to open the area to off-road vehicle use must include whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the road opening because it reveals the threat of unnecessary degradation of the natural and cultural resources, the decision will be reversed.

California Wilderness Coalition et al., 101 IBLA 18 (Jan. 25, 1988)



ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

Where facts and law are properly set forth and applied in Administrative Law Judge's decision affirming the BLM Area Manager's decision determining that the appellant had grazed livestock in his allotment beyond his authorized use; that the grazing of the livestock constituted a willful trespass; and that the appellant's grazing authorization should be suspended until he paid assessed trespass damages, and appellant has made no showing that the decision is in error, the decision will be affirmed.

Kent Gregersen v. Bureau of Land Management, 101 IBLA 269 (Mar. 8, 1988)

The jurisdiction of the Board of Land Appeals has been delegated by the Secretary of the Interior, and the scope of this Board's authority is stated in 43 CFR Part 4. The Board has not been empowered to rule on the merits of an affirmative defense that an appellant is protected under the bankruptcy laws because debt claims were not filed as Proof of Claim with the U.S. Bankruptcy Court. The Bankruptcy Court is the proper forum for a determination on that issue.

Lomax Exploration Co., 105 IBLA 1 (Oct. 7, 1988)

In a petition for reconsideration of a Board decision closing roads within the King Range Wilderness Study Area to off-road vehicle use, BLM offered new evidence to show that it increased its law enforcement capability in the area and has purchased property in order to better control illegal off-road vehicle use. In consideration of the new evidence tending to show that BLM will be better able to control off-road traffic as a result, the Board's prior decision will be vacated in part where the evidence shows that these measures will protect against the impact of off-road vehicle use on the natural and cultural resources of the wilderness study area.

California Wilderness Coalition et al. (On Reconsideration), 105 IBLA 196 (Nov. 2, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

Approval or amendment of a resource management plan are not actions appealable to the Board of Land Appeals. However, any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Albert Yparraguirre, 105 IBLA 245 (Nov. 4, 1988)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that lands are within a KGS has the burden of establishing by a preponderance of the evidence that inclusion of the land is erroneous.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short-term order, capable of repetition, yet evading review.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and



ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedADMINISTRATIVE REVIEW--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

An appeal from a decision approving an application for a recreational permit for a motor vehicle trip through Arch Canyon, Utah, could not be dismissed as moot even though the challenged event had occurred, where issues raised by the appeal were capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

BURDEN OF PROOF

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

ADMINISTRATIVE PROCEDURE--ContinuedBURDEN OF PROOF--Continued

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

The burden of establishing a valid color-of-title claim is on the claimant.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

In a grazing trespass case initiated by BLM upon an order to show cause, the burden of proof is properly placed upon BLM as the proponent of the order sought to establish by substantial evidence the occurrence of cattle trespass.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

ADMINISTRATIVE PROCEDURE--ContinuedBURDEN OF PROOF--Continued

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr., Verna R. Carter, 90 IBLA 286 (Feb. 13, 1986)

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

ADMINISTRATIVE PROCEDURE--ContinuedBURDEN OF PROOF--Continued

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

In appeals under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)

Melissa M. Peall v. Acting Area Director, Portland Area Office, Bureau of Indian Affairs, 16 IBIA 163 (June 21, 1988)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan approved by the authorized officer as required by regulation at 43 CFR 3162.3-4(a). Where the record on appeal from a decision requiring an operator to replug a well discloses a material issue of fact regarding whether the well was properly plugged, the case is properly referred for an evidentiary hearing pursuant to 43 CFR 4.415.

Coleman Oil & Gas, Inc., 104 IBLA 363 (Sept. 27, 1988)

There is an established legal presumption, which may be rebutted, that official acts of public officers discharging their official duties are regular. That presumption can be rebutted by substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a presumption of the evidence.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)



ADMINISTRATIVE PROCEDURE--ContinuedBURDEN OF PROOF--Continued

Where there is the usual presumption that surveys of the United States are correct and in compliance with statutory requirements there then exists a burden upon the claimant arguing survey error to establish, by a preponderance of the evidence, that the survey was fraudulent, or grossly erroneous. If a preponderance of the evidence indicates, in fact, that a fraudulent survey did not take place, the Secretary has no grounds upon which to issue a new survey.

Pueblo of Sandia Boundary, M-36963 (Dec. 9, 1988)  
96 I.D. 331

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

In order to sustain a charge that an Administrative Law Judge should be disqualified or his decision set aside because of bias or misconduct, a substantial showing of such bias or misconduct must be made. An assumption that he might be predisposed in favor of the Government is not sufficient.

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedDECISIONS

A decision by an Administrative Law Judge who did not preside over a hearing in a mining claim contest will not be overturned for that reason where an evaluation of the credibility of witnesses was not a material factor in reaching the decision.

United States v. Jean M. McMullin, David S. McMullin, 102 IBLA 276 (May 24, 1988)

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Ernestine M. Smith et al v. Area Director, Muskogee Area Office, Bureau of Indian Affairs, 16 IBLA 153 (June 21, 1988)

"Adverse party." An "adverse party" to a case is one who will be disadvantaged if the agency decision is appealed and if the appellant prevails. A party who is determined by BLM to have priority for two oil and gas leases over another party will be disadvantaged if the latter prevails on an appeal to the Board of Land Appeals and should be named as an "adverse party" in the decision rejecting the latter's offer.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

When the rental provision of the lease allows BLM to increase the rental rate upon notice that the leased land has been determined to be within a KGS, a decision by BLM to giving the lessee notice that the land has been included in a KGS is not contrary to the terms of the lease.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)



ADMINISTRATIVE PROCEDURE--ContinuedDECISIONS--Continued

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

HEARINGS

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potential exclusivity use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

applicant's entitlement to the allotment may be presented.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

No hearing is required to declare a mining claim invalid when there is no issue of material fact and it is clear from the record that at the time of location of the claim the land was not open to location.

Nancy Lee Mines, Inc., 89 IBLA 257 (Oct. 31, 1985)

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required prior to a decision holding that such claims are invalid.

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Davis Exploration, 112 IBLA 254 (Dec. 28, 1989)

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBLA 111 (May 21, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

Where BLM never adjudicated a timely protest to the filing of a notice of plat of survey, and the protest disputes the conclusion that a tract of land was an unsurveyed island at the time of the original survey, the protest may be referred for a hearing.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a rental adjustment was based on substantial evidence, the matter will be referred for an evidentiary hearing and recommended decision.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 5 (Oct. 8, 1986)

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) <sup>94</sup> I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)



ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

San Juan County, 102 IBLA 155 (Apr. 29, 1988)  
95 I.D. 61

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

Daniel Roehl, 103 IBLA 96 (July 12, 1988)

A case before the Board of Indian Appeals which raises a genuine issue of material fact or facts will be referred for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)



ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

A request for a hearing will be granted only where there is a material issue of fact requiring resolution through the introduction of testimony or other evidence. In the absence of such an issue, no hearing is required.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

Pursuant to 43 CFR 3533.4(b), an applicant for a potassium preference right lease whose application is rejected by the Bureau of Land Management is entitled to a hearing before an Administrative Law Judge, if the applicant has alleged in the application facts the applicant believes to be sufficient to show entitlement to a lease.

Earth Sciences, Inc., 106 IBLA 313 (Jan. 6, 1989)

When an appellant fails to submit any evidence tending to contradict the evidence presented by the Bureau of Land Management, there is no factual dispute and the Board will reject appellant's request for an evidentiary hearing pursuant to 43 CFR 4.415.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant

ADMINISTRATIVE PROCEDURE--ContinuedHEARINGS--Continued

is not entitled, as a matter of law, to a Native allotment.

Jonas Ningeok, 109 IBLA 347 (June 23, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers in the discharge of their duties, must for reasons of public policy and under burden of proof analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

June I. Degman (On Reconsideration), 111 IBLA 360 (Nov. 3, 1989)

JUDICIAL REVIEW

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedLICENSING

Except in cases of willfulness or where public health, interest or safety required otherwise, 5 U.S.C. § 558(c) (1982), dictates that, prior to institution of proceedings to revoke an Indian trader's license, the licensee must be given written notice of the facts or conduct that may warrant revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements.

For purposes of the procedural requirements concerning license revocation in 5 U.S.C. § 558(c) (1982), a finding that a licensed Indian trader acted willfully requires evidence that he acted intentionally or with careless disregard of agency requirements.

Elias H. Attea, Jr. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 16 IBIA 138 (June 6, 1988)

RULEMAKING

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)  
93 I.D. 13

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

JN Oil & Gas, 101 IBLA 394 (Apr. 1, 1988)

ADMINISTRATIVE PROCEDURE--ContinuedRULEMAKING--Continued

An interpretative rule, which is not subject to the notice and comment procedures of 25 U.S.C. § 553, is one which merely explains and sets forth with greater specificity the agency's understanding or interpretation of that which a statute already requires.

83 IAM 7.2(E), requiring the submission of attorney vouchers to the Department of the Interior for approval before they can be paid, is merely a restatement of what is already specifically required by 25 U.S.C. § 82.

To the extent that the fixing of fees for attorney contracts was contemplated under both 25 U.S.C. §§ 81 and 476, sec. 476 does not supersede sec. 81. Application of those requirements of sec. 81 relating to the fixing of fees to attorney contracts entered into under sec. 476 is a reasonable interpretation of the Secretary's responsibilities with respect to the "fixing of fees." The application of such requirements constitutes, at most, an interpretative rule that need not be published in the Federal Register.

White Mountain Apache Tribe v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 16 IBIA 51 (Mar. 18, 1988)

A MMS decision that interprets a Notice to Lessees as excluding a category of leases is an adjudication and need not be adopted in accordance with notice-and-comment rulemaking procedures with 5 U.S.C. § 553 (1982).

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepleted investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

ADMINISTRATIVE PROCEDURE--ContinuedRULEMAKING--Continued

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

Appellant's argument that promulgation of late payment interest assessment regulations failed to comply with the notice and comment provisions of 5 U.S.C. § 553 (1982), is moot as the appropriate remedy has already been provided.

Mesa Petroleum Co., 111 IBLA 201 (Oct. 12, 1989)

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

Amoco Production Co., 112 IBLA 77 (Nov. 22, 1989)

STANDING

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)  
92 I.D. 83

ADMINISTRATIVE PROCEDURE--ContinuedSTANDING--Continued

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Fred J. Schikora, 89 IBLA 251 (Oct. 31, 1985)

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as



ADMINISTRATIVE PROCEDURE--ContinuedSTANDING--Continued

a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

E Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

Under 43 CFR 4.410(a), there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

ADMINISTRATIVE PROCEDURE--ContinuedSTANDING--Continued

Where BLM has approved the assignment of a wind park right-of-way subject to execution of new authorized user agreements with existing authorized users who have the right to use sites within the right-of-way for construction of wind turbine generators, such users have standing to appeal from a subsequent BLM decision issued to the right-of-way holder ordering removal of all generators on the right-of-way.

Storm Master Owners et al., 103 IBLA 162 (July 21, 1988)

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

A tribal member lacks standing to bring an administrative action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBLA 250 (Aug. 24, 1989)



# ADMINISTRATIVE PROCEDURE--Continued

## STANDING--Continued

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

## SUBSTANTIAL EVIDENCE

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

## AGENCY

One who chooses the means of delivery of a document must accept the responsibility and bear the consequences of delay or nondelivery.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

# ALASKA

## GENERALLY

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

Agnes Mayo Moore (On Judicial Remand), 102 IBLA 147 (Apr. 26, 1988)

## ALASKA NATIVE CLAIMS SETTLEMENT ACT

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication

ALASKA--Continued

## ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985) 92 I.D. 620

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other Federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

ALASKA--Continued

## ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is a prerequisite to selection of land by a Native village.

Paul Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

ALASKA--Continued

## ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

With the exception of the rights specifically granted or retained by that Act, sec. 4 of ANCSA, 43 U.S.C. § 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homesite was located, and thus is barred.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

## COAL LEASES AND PERMITS

Where BLM has approved the assignment of a record title interest in an Alaskan coal lease at a time when the lease account is not in good standing, the assignment is not void but voidable at the discretion of BLM. If the assignment has not been voided by BLM, it remains in effect and binds the assignees.

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty

ALASKA--Continued

## COAL LEASES AND PERMITS--Continued

and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

Alaska Statebank, The Travelers Indemnity Co., 111 IBLA 300 (Oct. 27, 1989)

## GRAZING

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 93 IBLA 109 (July 24, 1986)

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

## HEADQUARTERS SITES

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)



ALASKA--ContinuedHEADQUARTERS SITES--Continued

A notice of location of a headquarters site is properly rejected where at the time of filing the land involved is not unreserved public land because it had been withdrawn from all forms of appropriation under the public land laws by Public Land Order No. 5418 for classification and protection of the public interest.

Mark L. Whitman, 98 IBLA 391 (Aug. 5, 1987)

Summary dismissal of a private contest against an Alaska headquarters site cannot be sustained on grounds the contestee was not served with the contest complaint where, on appeal, the contestant produces proof that the complaint was served in conformity to 43 CFR 4.450-5.

Pursuant to 43 CFR 4.450-1, a private contest may not be brought for reasons appearing of record with the Bureau of Land Management. Where all the matters alleged by a contest complaint appear on agency records at the time the complaint is filed, it is subject to summary dismissal.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

Because sec. 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, repealed the trade and manufacturing site and headquarters' site law, effective Oct. 21, 1986, no new claim may be initiated under that law on or after that date.

Jack Kim, Francoise Kim, 103 IBLA 104 (July 13, 1988)

ALASKA--ContinuedHOMESITES

Substantial compliance with the law is a prerequisite for the invocation of equitable adjudication to permit consideration of a homesite purchase application that was not filed within the time required.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed and gives the patentee the protection of a judicial forum.

A protest of the acceptance of a notice of location of a homesite which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

A field investigation report prepared by BLM is not a protest.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered



ALASKA--Continued

## HOMESITES--Continued

payment for the land and a receipt has not been issued.

Subsec. 4(c) of ANSCA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homestead location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homestead was located, and thus is barred.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

Where it appears that occupancy of a homestead in Alaska began in Sept. 1983, calculation of years of occupancy must commence with that date. There is no requirement that occupancy for purposes of establishing a homestead claim pursuant to 43 U.S.C. § 687a (1982), be continuous throughout any given calendar year.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

## HOMESTEADS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but

ALASKA--Continued

## HOMESTEADS--Continued

begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Failure by the Government to deliver a notice of contest action brought against a homestead entry within 30 days of commencement of action does not affect the validity of the complaint where notice of the action is given to the entryman in a reasonably timely manner.

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985) 92 I.D. 109

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

ALASKA--ContinuedHOMESTEADS--Continued

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

LAND GRANTS AND SELECTIONS

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

ALASKA--ContinuedLAND GRANTS AND SELECTIONS--Continued

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon E. Griffin, 92 IBLA 87 (May 28, 1986)

ALASKA--Continued

## LAND GRANTS AND SELECTIONS--Continued

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

Under sec. 6(g) of the Alaska Statehood Act, 72 Stat. 340, the Secretary of the Interior is required, when revoking an existing withdrawal of public land in Alaska, to provide a 90-day period during which time the State of Alaska is afforded a preference right to select the land. Where a public land order revokes a prior withdrawal so as to make the land available for selection by the State, the land may not be simultaneously opened for the location of mining claims for metalliferous minerals, and a public land order purportedly opening such land to mineral location is only effective after the passage of the 90-day period mandated by the Alaska Statehood Act.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

ALASKA--Continued

## LAND GRANTS AND SELECTIONS--Continued

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon applications or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(iii), (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

Agnes Mayo Moore (On Judicial Remand), 102 IBLA 147 (Apr. 26, 1988)

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended,



ALASKA--ContinuedLAND GRANTS AND SELECTIONS--Continued

43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

Although the occupancy provisions of the Alaska Organic Acts (Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26 and Act of June 5, 1900, ch. 786, § 27, 31 Stat. 330) protected Native and missionary station occupation of lands as of the dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors)  
106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

ALASKA--ContinuedMINING CLAIMS

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(iii), (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Public Land Order No. 5251 continued in effect the withdrawal of lands in Alaska from location and entry under the mining laws that was initiated by the earlier Public Land Order No. 5179.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)



ALASKA--Continued

## NATIVE ALLOTMENTS

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication, precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

Native allotment applications describing land in Alaska within a State selection application filed prior to Dec. 18, 1971, are generally excepted from the statutory approval afforded by sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act and must be adjudicated under the provisions of the Alaska Native Allotment Act.

Where the record in a Native allotment case contains significant evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)

Sec. 905(c) of Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), authorizes a Native allotment applicant to amend the description of the land in his application to accurately describe the parcel for which he applied. It does not authorize an applicant to substitute different land.

Joash Tukle, 86 IBLA 26 (Mar. 29, 1985)

An interim conveyance to a Native corporation under the Alaska Native Claims Settlement Act effectively conveys title to the land, subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance. Where a conflicting application has been relinquished prior to conveyance, and hence was not excluded, the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

Native allotment applications which are protested by an Alaskan Native corporation are not legislatively approved by the Alaska National Interest Lands Conservation Act, sec. 905(a)(1). Such applications must be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970).

A Native allotment applicant is required to make satisfactory proof of substantially continuous use

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment, and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Fred J. Schikora, 89 IBLA 251 (Oct. 31, 1985)

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

The hearing requirement mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), does not apply where the Bureau of Land Management has not concluded that a Native allotment application contains insufficient proof of qualifying use and occupancy of the claimed lands and has not determined to reject the application.

The Department has continuing jurisdiction to consider all issues in claims to land while legal

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

title remains in the United States. A Native allotment applicant obtains no legal title in land claimed by him prior to receipt of a "Native allotment."

Under 43 CFR 2561.1(c), a Native allotment applicant must describe "as accurately as possible" available lands he claims to have used or occupied in compliance with the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970) if the lands were unsurveyed under the rectangular survey system. Where the description provided "is ambiguous" so that the claimant's entitlement to a part of a trail is not clearly adjudicated under the Act notwithstanding that an allotment of a tract of the land was approved, the decision to grant the allotment will be set aside and the case remanded to determine whether the application included the trail in question and to review the claimant's entitlement to that trail as part of his allotment.

Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a private contest filed by the State of Alaska against such a Native allotment based on the State's claim to certain lands within the allotment as existing Federal Highway Act rights-of-way, which contest is filed more than 180 days following enactment of ANILCA, must be dismissed.

Sec. 905(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(e) (1982), provides that prior to issuing an allotment certificate, the Secretary will identify and adjudicate designated

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

record entries or applications for title claiming lands described in the allotment application. A Federal Highway Act grant is neither a record entry nor an application for title within the meaning of that section.

State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (Dec. 4, 1985)

An Alaska Native allotment application is not statutorily approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), if the land is included in a State selection application filed on or before Dec. 18, 1971, but is not within a core township of a Native village. Under sec. 905(a)(4), such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 - 270-3 (1970).

The Department of the Interior does not retain jurisdiction to hear a contest against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State of Alaska following commencement of the Native's use and occupancy. Sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership thus ousting the Department's jurisdiction to adjudicate title in a contest proceeding.

Although the Department of the Interior loses jurisdiction over title to lands tentatively approved to the State of Alaska and effectively conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), the Department has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate. An administrative hearing before a trier of fact where evidence and testimony of favorable witnesses was submitted prior to a decision

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

regarding validity of Native allotment claims will fulfill this obligation.

Elizabeth G. Cook, Eya Osterhaus, 90 IBLA 152 (Dec. 30, 1985)

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of



ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native Allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowning.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Secretarial Order No. 3040 of May 25, 1979, requires the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

If, when all of the allegations of material fact made by an applicant for a Native allotment are accepted as true, allowance of the application is barred as a matter of law, and the rule of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), is not applicable. The application is properly rejected without a hearing.

Ames Mayo Moore, 91 IBLA 343 (Apr. 21, 1986)

A Native allotment application filed pursuant to sec. 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970), is properly denied where the applicant fails to establish her independent use and occupancy as a minor child prior to withdrawal of the claimed land.

United States v. Annie Bennett, 92 IBLA 174 (June 11, 1986)



ALASKA--ContinuedNATIVE ALLOTMENTS--Continued

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as unrebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant.

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 355 (Sept. 15, 1986)

The Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed subject to pending applications, 43 U.S.C. § 1617 (1982), authorized the Secretary to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo who resided in and was a Native of Alaska. No allotment shall be made to any person until said person has made proof satisfactory to the Secretary of substantially continuous use and occupancy of the land for a period of 5 years.

Segregation of lands from appropriation under the Native Allotment Act by a proposed multiple-use management classification does not bar completion of

ALASKA--ContinuedNATIVE ALLOTMENTS--Continued

the required 5-years' use and occupancy where such use and occupancy has commenced prior to the segregation.

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

The standard of proof requirement to be applied in Native allotment cases is the preponderance of evidence standard, rather than the previously utilized standard of clear and credible evidence.

To qualify for an allotment under the Native Allotment Act and regulations, a Native must show substantial actual possession and use of the claimed land at least potentially exclusive of others and not merely intermittent use. Where the established use consists of approximately two trips per year to an area principally for hunting for a total of a few days to a week per trip, such use is properly characterized as intermittent.

United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

Land withdrawn as a military reservation and subsequently returned by Executive order to the jurisdiction of the Department of the Interior for disposition under the authority of the Act of July 5, 1884, ch. 214, 23 Stat. 103, is not thereby restored to the operation of the public land laws generally. Such land is not vacant, unappropriated, and unreserved, and hence, a Native allotment application filed for such land alleging use and occupancy commencing after the date of the withdrawal is properly rejected.

Harold Ahmasuk et al., 96 IBLA 42 (Feb. 27, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

If a legally sufficient protest is timely filed pursuant to sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982), the protest takes a Native allotment application out of the purview of sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and the allotment is not legislatively approved. A subsequent withdrawal of the protest would not result in a "revival" of the legislative approval.

When, on appeal, a Native allotment applicant is challenging a survey of the land described in an allotment application claiming it is not the land he



ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

intended to apply for, and evidence is submitted indicating the applicant may have executed and submitted a later application prior to repeal of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), the case will be referred for a hearing before an administrative law judge who will determine whether the later application was an amended application pending before the Department on or before Dec. 18, 1971.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a plan of survey for either the originally described or the newly described land.

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such requests, BLM is required to consider all evidence in the case, file and where such evidence does not clearly establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)  
94 I.D. 151

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuanguaruak, Mollie Itta, Wilber Ahtuanguaruak, 97 IBLA 261 (May 13, 1987)

A duty to reexamine the circumstances of the relinquishment of a Native allotment application in the face of an allegation that it was involuntary and unknown, notwithstanding the fact the land was subsequently conveyed out of Federal ownership, is founded on the special fiduciary responsibility of the Secretary of the Interior to Native Americans. Hence, a BLM decision refusing a petition by the heirs of a deceased Native allotment applicant to consider a previously relinquished application on the ground the relinquishment was involuntary and unknown may be set aside and the case remanded to allow consideration of the circumstances of the relinquishment.

Heirs of William A. Lisbourne et al., 97 IBLA 342 (May 22, 1987)

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

A right-of-way for an electric transmission line issued, subject to valid existing rights, pursuant to the Act of Mar. 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in the allotment after vesting of the preference right.

Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203 (June 29, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknown.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)



ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Prior to passage of sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of 1980, 43 U.S.C. § 1634(a)(3) (1982), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment.

The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1146, as amended, 43 U.S.C. § 1613 Note (1982), provides that "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands, or resources of lands withdrawn for Native selection" pursuant to the Alaska Native Claims Settlement Act (ANCSA) shall be deposited in an escrow account which shall be held until the lands have been conveyed to the "selecting corporation or individual entitled to receive benefits" under ANCSA. Where lands embracing a valuable deposit of gravel are withdrawn for Native village selection under ANCSA, the proceeds of a material sale contract with the State for the right to mine and remove the gravel are properly placed in the escrow account. Where the land is also within the boundary of an Alaska Native allotment claim pending before the Department on Dec. 18, 1971, which was expressly protected by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), and the selection by the Native village corporation is subsequently relinquished in favor of the Native allotment applicant, the proceeds of the escrow account for such land, upon conveyance to the allottee, are properly paid to the allottee as an individual entitled to receive benefits under ANCSA.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

The Bureau of Land Management may reserve a right-of-way for a segment of the Iditarod Trail in its approval of Native allotment applications. Reserving the right-of-way is an exercise of the discretion vested in the Secretary pursuant to sec. 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982), and the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

The Bureau of Land Management's decision approving a Native allotment application is an interim step in conveying an allotment to the applicant. The final conveyancing instrument is known as a "Native Allotment." The Department retains jurisdiction over the land in a Native allotment application until it

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

issues the final conveyancing document known as a "Native Allotment." Therefore, at any time prior to final conveyancing, the Department may reserve a public use right-of-way for a designated historic trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982).

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact, whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

Heirs of Linda Anelson, 101 IBLA 333 (Mar. 23, 1988)

June I. Degnan, 108 IBLA 282 (Apr. 26, 1989)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. The Department is not required by Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), to recover title to land conveyed to Atkasook Corp. in 1977, where a Native allotment application describing such land had been finally rejected prior to conveyance on the basis that the land was within the National Petroleum Reserve-Alaska.

Kate Aiken et al., 102 IBLA 131 (Apr. 21, 1988)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

Agnes Mayo Moore (On Judicial Remand), 102 IBLA 147 (Apr. 26, 1988)

An evidentiary hearing is ordered where an Alaska Native alleges that a purported relinquishment of her Native allotment application was unknowing and involuntary.

Lucy Lincoln, 102 IBLA 182 (May 5, 1988)

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

Where evidence at a hearing demonstrates an applicant for a Native allotment used the lands claimed in common with other Natives and ceased using them in a manner that left visible evidence thereof before filing his application, an Administrative Law Judge decision rejecting the application will be affirmed.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

BLM may not deny a request to amend a Native allotment application because it was filed subsequent to the adoption of a final plan of survey in the absence of evidence that the applicant received notice that the final plan of survey was to be adopted and had an opportunity to object to the contents of the plan.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982),

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

Daniel Roehl, 103 IBLA 96 (July 12, 1988)

A state protest against approval of a Native allotment application filed pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982), which identifies with specificity the fact relied upon to show an access route is in conflict with the allotment requires adjudication of the allotment pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982).

State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (Aug. 17, 1988)

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

William Carlo, Jr., 104 IBLA 277 (Sept. 13, 1988)



ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Use of land solely for berry picking may be sufficient to establish entitlement to a Native allotment therefor, where the use shown is substantial and it is also shown that the use was at least potentially exclusive of others.

Angeline Galbraith (On Reconsideration), 105 IBLA 333 (Nov. 14, 1988)

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Donald Peter, 107 IBLA 272 (Feb. 23, 1989)

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznookoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. Pursuant to *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), if a Native allotment applicant is rejected, and the rejection is based on factual issues, the applicant must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. In such case the application should be reinstated and considered to be pending on Dec. 18, 1971.

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refilled.

When an applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM has

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

rejected the application, but did not afford an opportunity for a hearing, the reinstated application should be considered as pending on Dec. 18, 1971. Such Native allotment applications are subject to the legislative conveyance provision of sec. 905 of ANILCA if there is no basis for a finding that, by reason of an exception to the legislative conveyance, the application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended.

State of Alaska, 109 IBLA 339 (June 22, 1989)

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

In order for a Native allotment applicant to gain a vested right to an allotment, the applicant must show 5-year's use and occupancy of the land and the filing of an application therefor. Where a Native uses and occupies land but does not file a Native allotment application for such land and thereafter ceases use and occupancy of the land for more than 20 years, during which time the Federal Government withdraws the land from appropriation under the public land laws, including the Native Allotment Act, a Native allotment application subsequently filed for the land must be rejected.

Where a Native allotment applicant asserts entitlement to a hearing in order to establish when use and occupancy of the claimed land commenced, no hearing is necessary where, accepting as true the applicant's allegations regarding his use and occupancy, applicant is not entitled, as a matter of law, to a Native allotment.

Jonas Ningeoek, 109 IBLA 347 (June 23, 1989)



ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (Aug. 24, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

ALASKA--Continued

## NATIVE ALLOTMENTS--Continued

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

Where a Native initiates use and occupancy of certain lands in 1937, but prior to the filing of an allotment application, a conflicting hot springs lease is issued and a public access trail was used to the hot springs, the later filing of the allotment application vests the inchoate preference right arising from the prior use and occupancy. That right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening hot springs lease and the use of the public access trail.

James E. Dawson, 111 IBLA 139 (Sept. 29, 1989)

An applicant for an allotment under the Native Allotment Act has a vested right to the land when he has filed an application and completed 5 years of substantially continuous use and occupancy and may be deemed to have abandoned his claim only when he either knowingly and willingly relinquishes it or fails to proceed with it and intends to abandon it.

When an applicant for an allotment under the Native Allotment Act demonstrates by a preponderance of the evidence that he has complied with the requirement

ALASKA--ContinuedNATIVE ALLOTMENTS--Continued

that he complete 5 years of substantial actual possession and use of the land for which he has applied in a manner at least potentially exclusive of others, his application should be approved.

Pedro Bay Corp., 111 IBLA 271 (Oct. 26, 1989)

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers in the discharge of their duties, must for reasons of public policy and under burden of proof analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

June I. Degnan (On Reconsideration), 111 IBLA 360 (Nov. 3, 1989)

An Alaska Native allotment application is not approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), where the land is included in a state selection application filed on or before Dec. 18, 1971. Under sec. 905(a)(4), such an application shall be adjudicated pursuant to the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

An application for a Native Allotment must be rejected if the alleged use and occupancy commenced after the time that a state selection application was filed for the land.

Christine Hansen Monroe, 112 IBLA 181 (Dec. 11, 1989)

ALASKA--ContinuedNAVIGABLE WATERSGenerally

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985) 92 I.D. 620

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

OIL AND GAS LEASES

An oil and gas lease offer for lands in Alaska describing the lands sought as less than 2,560 acres or four full sections, whichever is larger, is properly rejected, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

ALASKA--ContinuedOIL AND GAS LEASES--Continued

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

Marathon Oil Co. v. Minerals Management Service,  
106 IBLA 104 (Dec. 14, 1988) 95 I.D. 265

POSSESSORY RIGHTS

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985)

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Ed J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA  
113 (Jan. 2, 1986)

ALASKA--ContinuedPOSSESSORY RIGHTS--Continued

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management  
et al., 96 IBLA 198 (Mar. 19, 1987)

Where evidence at a hearing demonstrates an applicant for a Native allotment used the lands claimed in common with other Natives and ceased using them in a manner that left visible evidence thereof before filing his application, an Administrative Law Judge decision rejecting the application will be affirmed.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

With the exception of the rights specifically granted or retained by that Act, sec. 4 of ANCSA, 43 U.S.C. § 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on



ALASKA--Continued

## POSSESSORY RIGHTS--Continued

aboriginal use and occupancy but property rights created by Congress.

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homestead location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homestead was located, and thus is barred.

Although the occupancy provisions of the Alaska Organic Acts (Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26 and Act of June 5, 1900, ch. 786, § 27, 31 Stat. 330) protected Native and missionary station occupation of lands as of the dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants.

Cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy, or claim to the land terminates all possessory interests protected under the Alaska Organic Acts and restores the land to its original status as vacant and unappropriated land, regardless of subsequent allegations that the former occupants never intended to permanently abandon use and occupancy of the land. Unless evidence of continued use and occupancy can be shown, prior use and occupancy does not serve as a bar to the initiation of rights in the lands by others.

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

ALASKA--Continued

## STATEHOOD ACT

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)



ALASKA--Continued

## STATEHOOD ACT--Continued

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application

ALASKA--Continued

## STATEHOOD ACT--Continued

for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(iii), (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

ALASKA--ContinuedSTATEHOOD ACT--Continued

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

An application for a Native Allotment must be rejected if the alleged use and occupancy commenced after the time that a state selection application was filed for the land.

Christine Hansen Monroe, 112 IBLA 181 (Dec. 11, 1989)

ALASKA--ContinuedTOWNSITES

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Klawock, 94 IBLA 107 (Oct. 7, 1986)

The occupants of townsite lots at the time of approval of subdivisional survey are entitled to deeds to those lots from the townsite trustee pursuant to the regulation at 43 CFR 2565.3(c). An application for deed filed on behalf of a party not in occupancy at the time of subdivisional survey is properly rejected by the trustee.

Bristol Bay Housing Authority, 95 IBLA 20 (Dec. 12, 1986)

TRADE AND MANUFACTURING SITES

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

Agnes Mayo Moore (On Judicial Remand), 102 IBLA 147 (Apr. 26, 1988)

Trapping is not a qualifying use of land under the Act of May 14, 1898, which will support a trade and manufacturing site claim; instead, trapping is a use appropriate to acquisition of a headquarters' site, pursuant to the Act of Mar. 3, 1927. 43 U.S.C. § 687a (1982).

Because sec. 703(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, repealed the trade and manufacturing site and headquarters'

ALASKA--ContinuedTRADE AND MANUFACTURING SITES--Continued

site law, effective Oct. 21, 1986, no new claim may be initiated under that law on or after that date.

Jack Kim, Francoise Kim, 103 IBLA 104 (July 13, 1988)

Where, prior to May 31, 1981, a Native corporation for which land in Alaska has been withdrawn filed a protest against a trade and manufacturing site application covering that land, legislative approval of the site did not occur under sec. 1328(a) of the Alaska National Interest Land Conservation Act, 16 U.S.C. § 3215(a) (1982).

An applicant for a trade and manufacturing site fails to establish her entitlement to that site under the Trade and Manufacturing Site Act where, at a hearing convened following initiation of a Government contest challenging the validity of her claim, she fails to prove by a preponderance of the evidence that she had a reasonable expectation of deriving a profit from her cabin rental/recreational use business conducted on the site at the time she filed her application to purchase the site.

United States v. Norma J. Hodge, 111 IBLA 77 (Sept. 26, 1989)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACTGENERALLY

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedGENERALLY--Continued

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections subject to valid existing rights, and conveyed the land in dispute out of Federal control.

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985) 92 I.D. 109

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)



ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedGENERALLY--Continued

Sec. 810(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a) (1982), provides for notice, hearing, and procedural requirements where certain agency actions "significantly restrict subsistence use." Where a decision which concludes subsistence use will not be significantly restricted has reasonable support in the record, the statute does not require a hearing to be conducted.

Tulkisarmute Native Community Council et al., 88 IBLA 210 (Aug. 28, 1985)

Unpatented mining claims located upon land tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act and consequently the Department may no longer adjudicate the claims. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Ed Bilderback et al., 89 IBLA 263 (Nov. 6, 1985)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a private contest filed by the State of Alaska against such a Native allotment based on the State's claim to certain lands within the allotment as existing Federal Highway Act rights-of-way, which contest is filed more than 180 days following enactment of ANILCA, must be dismissed.

Sec. 905(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(e) (1982), provides that prior to issuing an allotment certificate, the Secretary will identify and adjudicate designated record entries or applications for title claiming lands described in the allotment application. A Federal Highway Act grant is neither a record entry nor an

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedGENERALLY--Continued

application for title within the meaning of that section.

State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (Dec. 4, 1985)

The Department of the Interior does not retain jurisdiction to hear a contest against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State of Alaska following commencement of the Native's use and occupancy. Sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership thus ousting the Department's jurisdiction to adjudicate title in a contest proceeding.

Elizabeth G. Cook, Eva Osterhaus, 90 IBLA 152 (Dec. 30, 1985)

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)



# ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

## GENERALLY--Continued

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Elizabeth S. Hjellen et al., 93 IBLA 203 (Aug. 20, 1986)

Mary Lou Redmond, 95 IBLA 379 (Feb. 20, 1987)

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under

# ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

## GENERALLY--Continued

the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), when land has been tentatively approved for transfer to the State of Alaska, legal title has been conveyed and the Department no longer possesses jurisdiction over the land and has no authority to affect title to it. This rule applies to land on which mining claims have been located when no exception for a mining claim has been made in the decision granting tentative approval.

Charles Renfro, 96 IBLA 311 (Apr. 2, 1987)

Where, prior to May 31, 1981, a Native corporation for which land in Alaska has been withdrawn filed a protest against a trade and manufacturing site application covering that land, legislative approval of the site did not occur under sec. 1328(a) of the Alaska National Interest Land Conservation Act, 16 U.S.C. § 3215(a) (1982).

United States v. Norma J. Hodge, 111 IBLA 77 (Sept. 26, 1989)

## DUTY OF DEPARTMENT OF THE INTERIOR TO NATIVE ALLOTMENT APPLICANTS

Native allotment applications describing land in Alaska within a State selection application filed prior to Dec. 18, 1971, are generally excepted from the statutory approval afforded by sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act and must be adjudicated under the provisions of the Alaska Native Allotment Act.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedDUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS--Continued

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Fred J. Schikora, 89 IBLA 251 (Oct. 31, 1985)

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

Although the Department of the Interior loses jurisdiction over title to lands tentatively approved to the State of Alaska and effectively conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), the Department has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate. An administrative hearing before a trier of fact where evidence and testimony of favorable witnesses was submitted prior to a decision regarding validity of Native allotment claims will fulfill this obligation.

Elizabeth G. Cook, Eya Osterhaus, 90 IBLA 152 (Dec. 30, 1985)

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedDUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS--Continued

not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. The Department is not required by Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), to recover title to land conveyed to Atkasook Corp. in 1977, where a Native allotment application describing such land had been finally rejected prior to conveyance on the basis that the land was within the National Petroleum Reserve-Alaska.

Kate Aiken et al., 102 IBLA 131 (Apr. 21, 1988)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. Pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), if a Native allotment applicant is rejected, and the rejection is based on factual issues, the applicant must be granted an opportunity for an oral hearing before a trier of fact before a decision to reject an allotment application can be considered to be final. In such case the application should be reinstated and considered to be pending on Dec. 18, 1971.

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

DUTY OF DEPARTMENT OF THE INTERIOR TO  
NATIVE ALLOTMENT APPLICANTS--Continued

abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

When an applicant has filed a Native allotment application prior to Dec. 18, 1971, and BLM has rejected the application, but did not afford an opportunity for a hearing, the reinstated application should be considered as pending on Dec. 18, 1971. Such Native allotment applications are subject to the legislative conveyance provision of sec. 905 of ANILCA if there is no basis for a finding that, by reason of an exception to the legislative conveyance, the application must be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended.

State of Alaska, 109 IBLA 339 (June 22, 1989)

NATIVE ALLOTMENTS

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C)



ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

A dirt airstrip is an improvement within the meaning of sec. 905(a)(5)(C) of ANILCA.

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

If a legally sufficient protest is timely filed pursuant to sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1982), the protest takes a Native allotment application out of the purview of sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and the allotment is not legislatively approved. A subsequent withdrawal of the protest would not result in a "revival" of the legislative approval.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a



ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

plan of survey for either the originally described or the newly described land.

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such requests, BLM is required to consider all evidence in the case, file and where such evidence does not clearly establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

"Potentially exclusive of others." As used in 43 CFR 2561.0-5 the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)  
94 I.D. 151

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuanguaruak, Mollie Itta, Wilber Ahtuanguaruak, 97 IBLA 261 (May 13, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. The Department is not required by Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), to recover title to land conveyed to Atkasook Corp. in 1977, where a Native allotment application describing such land had been finally rejected prior to conveyance on the basis that the land was within the National Petroleum Reserve-Alaska.

Kate Aiken et al., 102 IBLA 131 (Apr. 21, 1988)

An evidentiary hearing is ordered where an Alaska Native alleges that a purported relinquishment of her Native allotment application was unknowing and involuntary.

Lucy Lincoln, 102 IBLA 182 (May 5, 1988)

BLM may not deny a request to amend a Native allotment application because it was filed subsequent to the adoption of a final plan of survey in the absence of evidence that the applicant received notice that the final plan of survey was to be adopted and had an opportunity to object to the contents of the plan.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982),

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

Daniel Roehl, 103 IBLA 96 (July 12, 1988)

A state protest against approval of a Native allotment application filed pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982), which identifies with specificity the fact relied upon to show an access route is in conflict with the allotment requires adjudication of the allotment pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982).

State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (Aug. 17, 1988)

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

William Carlo, Jr., 104 IBLA 277 (Sept. 13, 1988)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

Use of land solely for berry picking may be sufficient to establish entitlement to a Native allotment therefor, where the use shown is substantial and it is also shown that the use was at least potentially exclusive of others.

Angeline Galbraith (On Reconsideration), 105 IBLA 333 (Nov. 14, 1988)

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed under that section where the applicant is seeking land in addition to that described in the original application.

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not included within the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

Donald Peter, 107 IBLA 272 (Feb. 23, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedNATIVE ALLOTMENTS--Continued

question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

NATIVE RESERVESBoundaries

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

SPECIAL LAND SETTLEMENTS

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)



ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

STATE SELECTIONS

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

A selection by the State of Alaska under sec. 906(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(e) (1982), is, by definition, for lands that are not presently available for selection. Under the statute, the selection takes effect if and when the lands become available for selection. Until the selection takes effect, the selection has no present segregative effect.

State of Alaska, 108 IBLA 181 (Apr. 13, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions, which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

STATE SELECTIONS--Continued

describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

VALID EXISTING RIGHTS

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)  
92 I.D. 109



# ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

## VALID EXISTING RIGHTS--Continued

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknowing.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jennie A. Wasey, Harold E. McNally, 92 IBLA 228 (June 24, 1986)

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

# ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

## VALID EXISTING RIGHTS--Continued

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), all right, title, and interest to tentatively approved land was legislatively conveyed to the State of Alaska, effective from the date of tentative approval. BLM's decision not to include a reservation for the Alaska natural gas transportation system right-of-way grant in a patent to tentatively approved lands will be affirmed, where the right-of-way was granted Dec. 1, 1980, and the lands were tentatively approved Oct. 16, 1963. The applicant has no valid existing rights to such right-of-way through those lands under sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), since the right-of-way was not issued prior to the tentative approval.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedVALID EXISTING RIGHTS--Continued

a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1982), approved, subject to valid existing rights and certain exceptions, all Native allotment applications which were pending before the Department on or before Dec. 18, 1971. One of these exceptions which is found at sec. 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), provides that when an allotment application describes land which on or before Dec. 18, 1971, was validly selected by the State of Alaska pursuant to the

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--ContinuedVALID EXISTING RIGHTS--Continued

Alaska Statehood Act it shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended. The filing of a homestead entry application segregates the land from all State selection. The filing of an acceptable application for a Native allotment also segregates the land, and a subsequent State application for all available lands, not accompanied by a showing that the applicant for allotment has permanently abandoned occupancy of the land, will create no rights as to the lands subject to the Native allotment application.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), permits the State to file State selection applications and amendments thereto, and to refile existing applications to include lands not available for selection under the Alaska Statehood Act when the application is filed. The "top filed" lands will become subject to the selection effective the date the lands become available within the meaning of the Alaska Statehood Act. A State selection made by refiling an existing State selection application incorporates only those additional lands which become available for selection within the meaning of the Alaska Statehood Act on or after the date the selection application is refiled.

State of Alaska, 109 IBLA 339 (June 22, 1989)

ALASKA NATIVE CLAIMS SETTLEMENT ACTGENERALLY

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedGENERALLY--Continued

application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

ABORIGINAL CLAIMS

With the exception of the rights specifically granted or retained by that Act, sec. 4 of ANCSA, of 43 U.S.C. § 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedABORIGINAL CLAIMS--Continued

in the past, including the time the homesite was located, and thus is barred.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

ADMINISTRATIVE PROCEDUREDecision to Issue Conveyance

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

An appellant challenging a decision by BLM to approve land for conveyance to a Native corporation pursuant to sec. 14(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(e) (1982), will be deemed to lack standing under 43 CFR 4.410(b) to pursue the appeal of a BLM determination not to reserve a public easement in the conveyance pursuant to 43 U.S.C. § 1616(b)(1) (1976), where the appellant has failed to identify any property interest in public land or has identified only a property interest in private land which is not adversely affected by the decision.

Frances A. Kibble et al., 100 IBLA 261 (Dec. 9, 1987)

Interim Administration

The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1146, as amended, 43 U.S.C. § 1613 Note (1982), provides that "all proceeds derived from contracts, leases, permits, rights-of-way, or easements pertaining to lands or resources of lands withdrawn for Native selection" pursuant to the Alaska Native Claims

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedADMINISTRATIVE PROCEDURE--ContinuedInterim Administration--Continued

Settlement Act (ANCSA) shall be deposited in an escrow account which shall be held until the lands have been conveyed to the "selecting corporation or individual entitled to receive benefits" under ANCSA. Where lands embracing a valuable deposit of gravel are withdrawn for Native village selection under ANCSA, the proceeds of a material sale contract with the State for the right to mine and remove the gravel are properly placed in the escrow account. Where the land is also within the boundary of an Alaska Native allotment claim pending before the Department on Dec. 18, 1971, which was expressly protected by sec. 18(a) of ANCSA, 43 U.S.C. § 1617(a) (1982), and the selection by the Native village corporation is subsequently relinquished in favor of the Native allotment applicant, the proceeds in the escrow account for such land, upon conveyance to the allottee, are properly paid to the allottee as an individual entitled to receive benefits under ANCSA.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

APPEALSGenerally

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedAPPEALS--ContinuedGenerally--Continued

affirmed as long as it is supported by a rational basis and the record.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Standing

In order to establish standing to appeal a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), an appellant need not assert a property interest in land selected by the Native group, but need only assert that he is adversely affected by



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS--Continued

Standing--Continued

the eligibility determination by virtue of his use of the selected land.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

Standing to appeal decisions relating to land selection under the Alaska Native Claims Settlement Act requires that a party have a property interest in land affected by the decision. 43 CFR 4.410(b). The allegation of ownership and use of lands as a member of the public does not establish standing.

The holder of a current permit from the U.S. Fish and Wildlife Service to use lands selected by a Native group has a property interest or valid existing right derived from the permit which is protected under sec. 14(g) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(g) (1982), and such property interest in the land is sufficient to confer standing under 43 CFR 4.410(b) to appeal a decision involving the Native group land selection.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

A party has standing to appeal a Department decision relating to land selections under the Alaska Native Claims Settlement Act, as amended, if the party claims a property interest in land affected by the decision, such as the right to use an existing right-of-way pursuant to a right-of-way use agreement.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

APPEALS--Continued

Standing--Continued

An appellant challenging a decision by BLM to approve land for conveyance to a Native corporation pursuant to sec. 14(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(e) (1982), will be deemed to lack standing under 43 CFR 4.410(b) to pursue the appeal of a BLM determination not to reserve a public easement in the conveyance pursuant to 43 U.S.C. § 1616(b)(1) (1976), where the appellant has failed to identify any property interest in public land or has identified only a property interest in private land which is not adversely affected by the decision.

Frances A. Kibble et al., 100 IBLA 261 (Dec. 9, 1987)

CONVEYANCES

Generally

Where the subsurface mineral estate is severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. Since no such contrary intent was manifested in the Alaska Native Claims Settlement Act, insofar as lands in Naval Petroleum Reserve No. 4, now NPR-A, are concerned, the Department of the Interior, as the present owner of the mineral estate, is vested with such right of entry or access independent of any contractual grant of access rights.

Kuugpik Corp., 85 IBLA 366 (Mar. 26, 1985)

The Secretary is authorized to convey lands out of a wildlife refuge pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(h)(7) (1982). This authority has not been rescinded by amendments to the National Wildlife Refuge System Administration Act or by the Alaska National Interest Lands Conservation Act.

Departmental regulation 43 CFR 2653.6(b)(1) (1976) precluded Native groups from receiving land benefits

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedGenerally--Continued

under the Alaska Native Claims Settlement Act if the lands selected by them were in a wildlife refuge. However, Secretarial Order No. 3083 of June 17, 1982, issued pursuant to 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation promulgated to implement the Alaska Native Claims Settlement Act, waived the bar to conveyance of refuge lands.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

Acreage Entitlement

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedCemetery\_Sites\_and\_Historical\_Places

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

Applications by regional corporations for fee title to historical places pursuant to 43 U.S.C. § 1613(h)(1) (1982) segregate the land from appropriation under the public land laws, including the mining and mineral leasing laws.

W.O.I.L. Associates, 92 IBLA 312 (June 26, 1986)

Applications by regional corporations for fee title to historical places pursuant to 43 U.S.C. § 1613(h)(1) (1982) segregate the land from appropriation under the public land laws, including the mining and mineral leasing laws. Mining claims subsequently located on segregated land are properly declared null and void ab initio.

Donald D. Hall et al., 95 IBLA 33 (Dec. 15, 1986)

Where the record establishes that a specific site has historic significance for Native history or culture and the site meets the criteria set forth at 45 CFR 2653.5, this site is properly conveyed to the appropriate Native Regional Corporation pursuant to 43 U.S.C. § 1613(h)(1) (1982).

United States Forest Service, 101 IBLA 38 (Jan. 26, 1988)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

State of Alaska, 86 IBLA 263 (May 10, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act authorizes the Secretary, when issuing a conveyance for lands to a village corporation under sec. 19 of the Alaska Native Claims Settlement Act, to reserve such easements as are reasonably necessary to guarantee access to major waterways and publicly owned lands. BLM's reservation of a site easement for such purpose will not be disturbed in the absence of a showing that the BLM determination is erroneous.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

Where the Bureau of Land Management reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements--Continued

is subject to the claimed R.S. 2477 right-of-way "if valid."

Alaska Dept. of Transportation, 88 IBLA 106 (July 23, 1985)

Where the record does not contain sufficient evidence to determine whether the use of certain waterways is "significant" or is for purposes of "access to publicly owned lands or between communities," a hearing will be ordered on the question of whether they are "major waterways" within the meaning of 43 CFR 2650.0-5(o).

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

When the United States reserves sec. 17(b) public easements in conveyances to village and regional corporations under the Alaska Native Claims Settlement Act, Department regulations specify that when an existing road is less than 60 feet, "existing road" easements shall be no more than 60 feet wide unless a greater width is justified by "special circumstances." The party alleging the special circumstances warranting a variance bears the burden of proving circumstances exist which necessitate reservation of an easement in excess of 60 feet in width.



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedEasements--Continued

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Although the primary standard for determining which public easements are reasonably necessary for access is present existing use, 43 CFR 2650.4-7(a)(3), authorizes a departure from this standard if, inter alia, there is no reasonable alternative route or site available.

Tigara Corp., 101 IBLA 73 (Jan. 29, 1988)

Interim Conveyance

An interim conveyance to a Native corporation under the Alaska Native Claims Settlement Act effectively conveys title to the land, subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANCSA conveyance. Where a conflicting application has been relinquished prior to conveyance, and hence was not excluded, the Department has no authority to reinstate the application pursuant to a request filed subsequent to the interim conveyance.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedInterim Conveyance--Continued

Where an interim conveyance to a Native village corporation under sec. 22(j) of ANCSA, 43 U.S.C. § 1621(j) (1982), is made after enactment of ANILCA, such a conveyance may not be considered a valid existing right under sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), and a relinquished Native allotment application may constitute a valid existing right under sec. 22(j) of ANCSA, if the applicant can establish that his relinquishment was involuntary and unknown.

Peter John, 91 IBLA 305 (Apr. 15, 1986)

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement, signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)

Native Groups

A determination by the Bureau of Indian Affairs to issue a certificate of ineligibility to a Native corporation claiming status as a Native group under sec. 14(h)(2) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1613(h)(2) (1982) because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that on the critical census date the four Native members were grandparents and two adult grandchildren, and that the living situation at the group locality was that of a single family or household with the grandfather as head of that family or household.

Deacon's Landing, Inc., 86 IBLA 340 (May 16, 1985)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Native\_Groups--Continued

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because members of the group did not constitute a majority of the residents of the locality on Apr. 1, 1970 will be affirmed where it is based on a thorough field investigation, supported by numerous affidavits, and meets the criteria of 43 CFR 2653.6(a)(4).

Wisenak, Inc., 87 IBLA 67 (May 28, 1985)

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

In order to establish standing to appeal a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), an appellant need not assert a property interest in land selected by the Native group, but need only assert that he is adversely affected by the eligibility determination by virtue of his use of the selected land.

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

A determination by the Bureau of Indian Affairs to deny a Native corporation status as a Native group because members of the group did not constitute a majority of the residents of the locality on Apr. 1, 1970, will be affirmed where after a hearing is held the facts of record show that there were 30 residents of the locality on Apr. 1, 1970, of which only 15 were group members, and, therefore, the group failed to

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Native\_Groups--Continued

qualify as the majority of the residents of the locality as required by 43 CFR 2653.6(a)(4).

Chugach Alaska Corp., The Grouse Creek Corp., 94 IBLA 24 (Sept. 25, 1986)

Reconveyances

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Regional\_Conveyances

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration),  
100 IBLA 50 (Nov. 24, 1987)  
94 I.D. 422

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedRegional\_Conveyances--Continued

2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

Sec. 30 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1627 (1982), authorizes the merger of Native corporations subject to the requirement that the right of a Native village corporation to withhold consent to mineral development activities within the village be conveyed as a part of the merger to a separate entity composed of the Native residents of the village. A decision recognizing such a condition in a conveyance of the subsurface estate to a Native regional corporation will be upheld where it appears the condition is required by statute.

Ahtna, Inc., 105 IBLA 380 (Nov. 29, 1988)

Where a Native village corporation and a Native regional corporation have merged pursuant to 43 U.S.C. § 1627 (1982), BLM may properly include a consent stipulation, subjecting mining activity within the Native village to the consent of a separate entity composed of Native residents of the village, in an interim conveyance of land to the Native regional corporation.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedValid\_Existing\_RightsGenerally

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

Subsec. 4(c) of ANCSA, 43 U.S.C. § 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homesite was located, and thus is barred.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedValid Existing Rights--ContinuedThird-Party Interests

BLM's waiver of its right to continue to administer leases, contracts, permits, rights-of-way, and easements to the extent they encumber land which has since been conveyed to Alaska Native corporations has the effect of transferring the responsibility and authority for such administration to the grantee corporation. Where all of the land occupied by such an outstanding third-party interest has been so conveyed, BLM must waive its administration of such interests as mandated by 43 CFR 2650.4-3, absent a Secretarial finding that retention of that function is in the interest of the United States. BLM policy favoring partial waivers in most instances appears to comport well with the public interest and will not be disturbed by the Board merely because the State of Alaska would prefer to preserve the status quo.

State of Alaska, 86 IBLA 268 (May 10, 1985)

Where the underlying land has been conveyed to a Native corporation, 43 CFR 2650.4-3 requires that BLM waive administration of a right-of-way pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), absent a finding that retention would be in the interest of the United States.

State of Alaska, 97 IBLA 229 (May 11, 1987)

Absent a finding by the Secretary that retention is in the interest of the United States, a BLM decision waiving administration of a public airport lease pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), with respect to land conveyed to a Native village corporation, will be affirmed as required by 43 CFR 2650.4-3.

State of Alaska, Dept. of Transportation & Public Facilities, 98 IBLA 88 (June 10, 1987)

Kuitsarak, Inc., et al., 102 IBLA 200 (May 9, 1988)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedValid Existing Rights--ContinuedThird-Party Interests--Continued

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Absent a finding by the Secretary that retention is in the interest of the United States, a BLM decision waiving administration of a power transmission line right-of-way pursuant to sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982), with respect to land conveyed to a Native village corporation, will be affirmed as required by 43 CFR 2650.4-3.

Ahtna, Inc., 103 IBLA 71 (June 28, 1988)

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

Marathon Oil Co. v. Minerals Management Service, 106 IBLA 104 (Dec. 14, 1988) 95 I.D. 265



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedValid Existing Rights--ContinuedThird-Party Interests--Continued

BLM properly declines to make a conveyance to a Native regional corporation subject to special use permits where the permits have either expired by their own terms or provide that they will terminate prior to conveyance to the corporation, as such permits cannot be considered valid existing rights at the time of conveyance within the meaning of sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982).

Mt. Bether Bible Center, Inc., 111 IBLA 186 (Oct. 6, 1989)

Village Conveyances

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedCONVEYANCES--ContinuedVillage Conveyances--Continued

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Sec. 30 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1627 (1982), authorizes the merger of Native corporations subject to the requirement that the right of a Native village corporation to withhold consent to mineral development activities within the village be conveyed as a part of the merger to a separate entity composed of the Native residents of the village. A decision recognizing such a condition in a conveyance of the subsurface estate to a Native regional corporation will be upheld where it appears the condition is required by statute.

Ahtna, Inc., 105 IBLA 380 (Nov. 29, 1988)

Where a Native village corporation and a Native regional corporation have merged pursuant to 43 U.S.C. § 1627 (1982), BLM may properly include a consent stipulation, subjecting mining activity within the Native village to the consent of a separate entity composed of Native residents of the village, in an interim conveyance of land to the Native regional corporation.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

## DEFINITIONS

Federal Installation

Where the record on appeal establishes a reasoned basis for reservation of a buffer zone around a shellfish research station to protect water quality and prevent erosion, there is shown a sufficient connection between the creation of such a buffer zone and the Federal administration of the research facility to sustain the determination to retain the buffer zone as part of the station. The lands comprising the buffer



ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

## DEFINITIONS--Continued

Federal Installation--Continued

zone are not subject to selection by a Native corporation absent a showing that the decision to reserve the lands pursuant to 43 U.S.C. § 1602(e) (1982), was in error.

Seldovia Native Ass'n, Inc., 95 IBLA 177 (Jan. 13, 1987)

Land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation may properly be excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982).

Bethel Native Corp., Public Health Service, 101 IBLA 298 (Mar. 16, 1988)

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

Public\_Lands

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

## DEFINITIONS--Continued

Public\_Lands--Continued

selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

The smallest practicable tract of land occupied and actually used by the Bureau of Indian Affairs as a school during the period of time it was available for selection by a Native village corporation does not come within the definition of "public lands" under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), and thus is not available for Native village selection even though the Bureau entered into an agreement during the selection period to transfer use of the land to a State agency.

Olgoonik Corp., Inc., 95 IBLA 80 (Dec. 29, 1986)

Where the record on appeal establishes a reasoned basis for reservation of a buffer zone around a shellfish research station to protect water quality and prevent erosion, there is shown a sufficient connection between the creation of such a buffer zone and the Federal administration of the research facility to sustain the determination to retain the buffer zone as part of the station. The lands comprising the buffer zone are not subject to selection by a Native corporation absent a showing that the decision to reserve the lands pursuant to 43 U.S.C. § 1602(e) (1982), was in error.

Seldovia Native Ass'n, Inc., 95 IBLA 177 (Jan. 13, 1987)

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). Although it is not necessary that the land had been improved on Dec. 18, 1971, the excepted land must be

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedDEFINITIONS--ContinuedPublic\_Lands--Continued

in actual use on that date and throughout the selection period. Land which is the subject of planning or which is held for future use is available for selection.

Land actually used in connection with the administration of a Federal installation during the period of time that the land was available for selection by the Native village corporation may properly be excluded from an interim conveyance to a Native village corporation under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982).

Bethel Native Corp., Public Health Service, 101 IBLA 298 (Mar. 16, 1988)

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

EASEMENTSGenerally

When considering whether to reserve an easement across a Native land selection made pursuant to the Alaska Native Claims Settlement Act, the Department must consider, in addition to matters relating to the utility of the easement for the use sought, the impact of the reservation upon the Native corporation. The practicability of the use of other, non-Native lands as alternative easement sites must be considered. Such consideration should include the evaluation of alternative means to obtain the easement sought, including

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedEASEMENTS--ContinuedGenerally--Continued

possible licensing arrangements proposed by the Native corporation.

In considering whether to reserve a transportation easement across a Native corporation's land selection made under the Alaska Native Claims Settlement Act, the Department must not restrict consideration of alternate access to sites which have existing actual road access.

An evidentiary hearing is properly ordered to receive further evidence concerning suitable alternative sites for a transportation easement where the record is inadequate to support a finding that there are no suitable alternative easement sites providing similar access.

Goldbelt, Inc., 85 IBLA 273 (Mar. 12, 1985) 92 I.D. 134

Where the Bureau of Land Management reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of Alaska as an R.S. 2477 right-of-way, the conveyance documents shall contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way "if valid."

Alaska Dept. of Transportation, 88 IBLA 106 (July 23, 1985)

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

# ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

## EASEMENTS--Continued

### Generally--Continued

Although the primary standard for determining which public easements are reasonably necessary for access is present existing use, 43 CFR 2650.4-7(a)(3), authorizes a departure from this standard if, inter alia, there is no reasonable alternative route or site available.

Tigara Corp., 101 IBLA 73 (Jan. 29, 1988)

### Access

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

# ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

## EASEMENTS--Continued

### Access--Continued

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

### Decision to Reserve

Sec. 17(b) of the Alaska Native Claims Settlement Act authorizes the Secretary, when issuing a conveyance for lands to a village corporation under sec. 19 of the Alaska Native Claims Settlement Act, to reserve such easements as are reasonably necessary to guarantee access to major waterways and publicly owned lands. BLM's reservation of a site easement for such purpose will not be disturbed in the absence of a showing that the BLM determination is erroneous.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedEASEMENTS--ContinuedDecision to Reserve--Continued

A party appealing a BLM easement determination made pursuant to the Alaska Native Claims Settlement Act bears the burden of showing error.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

Present Existing Use

Pursuant to 43 CFR 2650.4-7(a)(3), the primary standard for determining which public easements are reasonably necessary for access shall be present existing use. The established interpretation of the "present existing use" requirement is that easements substantially conform to existing uses and that evidence of such use be recent.

State of Alaska, 86 IBLA 263 (May 10, 1985)

Public Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Where the evidence adduced at an evidentiary hearing shows that an easement does not qualify under sec. 17(b), BLM's decision seeking such an easement is properly reversed.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedEASEMENTS--ContinuedPublic Easements--Continued

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

Where the record does not contain sufficient evidence to determine whether the use of certain waterways is "significant" or is for purposes of "access to publicly owned lands or between communities," a hearing will be ordered on the question of whether they are "major waterways" within the meaning of 43 CFR 2650.0-5(o).

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

When the United States reserves sec. 17(b) public easements in conveyances to village and regional corporations under the Alaska Native Claims Settlement Act, Department regulations specify that when an existing road is less than 60 feet, "existing road" easements shall be no more than 60 feet wide unless a greater width is justified by "special circumstances." The party alleging the special circumstances warranting a variance bears the burden of proving circumstances exist which necessitate reservation of an easement in excess of 60 feet in width.

Where BLM reserves a sec. 17(b) public easement over an existing road or trail claimed by the State of



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedEASEMENTS--ContinuedPublic Easements--Continued

Alaska as an R.S. 2477 right-of-way, the conveyance documents should contain a provision specifying that the reserved public easement is subject to the claimed R.S. 2477 right-of-way if valid.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

A public easement for a future road may be reserved across lands conveyed to Native corporations only if such easement is site specific and the road actually planned for construction within 5 years of the date of conveyance, as required by 43 CFR 2650.4-7(b)(1)(v). An easement for a future road is not site specific where the easement describes one of three proposed routes and the location studies required to determine the preferred route have not been authorized.

Tatitlek Corp., 101 IBLA 76 (Feb. 2, 1988)

Review

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is upon the party challenging the determination to show that the decision is erroneous.

State of Alaska, 86 IBLA 263 (May 10, 1985)

NATIVE LAND SELECTIONSGenerally

When a Native village corporation and a class I municipal corporation are separate corporate entities, the provisions of 43 CFR 2650.6(a) do not apply to permit the Native corporation to select for conveyance those public lands located within 2 miles of the boundaries of the lands administered by the municipal corporation (commonly referred to as the city limits).

City of Nenana, 98 IBLA 177 (June 24, 1987)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedGenerally--Continued

Regulation 43 CFR 2650.6(a) authorizes selection by a village corporation within 2 miles from the boundary of any home-rule or first-class city when the village corporation is organized by Natives of a community which is itself a first-class or home-rule city, unless such selections fall within 2 miles from the boundary of another first-class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan.

City of Nenana (On Reconsideration), 106 IBLA 26 (Dec. 7, 1988)

Native Reserves

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

Regional SelectionsGenerally

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

In the absence of a Master Title Plat or other appropriate land use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedRegional\_Selections--ContinuedGenerally--Continued

lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the Native selection.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

Basil S. Bolstridge, Elizabeth W. Bolstridge, 90 IBLA 54 (Dec. 10, 1985)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C.

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedRegional\_Selections--ContinuedGenerally--Continued

§ 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedRegional\_Selections--ContinuedGenerally--Continued

record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc., amendment

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedRegional\_Selections--ContinuedGenerally--Continued

requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 610(a) (1982), is a prerequisite to selection of land by a Native village.

Paug Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Under sec. I.C.(2)(b) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet area, the Secretary is authorized to place lands into a pool for selection by Cook Inlet Region, Inc., if the State of Alaska concurs. In sec. 606(d)(5) of the Alaska Railroad Transportation Act of 1982, Congress provided that the concurrence required of the State as to the inclusion of any property in the pool shall be deemed obtained unless the State advises the Secretary in writing that it requires the property for a public purpose. By providing that transfer to the pool would occur unless notice were given that the State requires the property "for a public purpose," Congress opened to inquiry the State's basis for objecting to the transfer. As a result, BLM may properly require the State to demonstrate that it requires an out-of-region parcel for a public purpose



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedRegional Selections--ContinuedGenerally--Continued

in order for the State to block inclusion of the parcel in the CIRI selection pool.

State of Alaska, 106 IBLA 160 (Dec. 20, 1988) 95 I.D. 304

BLM properly declines to make a conveyance to a Native regional corporation subject to special use permits where the permits have either expired by their own terms or provide that they will terminate prior to conveyance to the corporation, as such permits cannot be considered valid existing rights at the time of conveyance within the meaning of sec. 14(g) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(g) (1982).

Mt. Bethel Bible Center, Inc., 111 IBLA 186 (Oct. 6, 1989)

Selection Limitations

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedSelection Limitations--Continued

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

Only land available for Native selection under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is subject to the provisions of the Cook Inlet Region, Inc. amendment requiring that there be consent by affected Native corporations prior to selection by Cook Inlet Region, Inc., of Federal lands located within the regions of other Native corporations.

The prior withdrawal of land under the Alaska Native Claims Settlement Act, sec. 11(a), 43 U.S.C. § 1610(a) (1982), is a prerequisite to selection of land by a Native village.

Paug Vik, Inc., Ltd., et al., 97 IBLA 235 (May 12, 1987)

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). Although it is not necessary that the land had been improved on Dec. 18, 1971, the excepted land must be in actual use on that date and throughout the selection period. Land which is the subject of planning or which is held for future use is available for selection.

Bethel Native Corp., Public Health Service, 101 IBLA 298 (Mar. 16, 1988)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedSelection Limitations--Continued

Regulation 43 CFR 2650.6(a) authorizes selection by a village corporation within 2 miles from the boundary of any home-rule or first-class city when the village corporation is organized by Natives of a community which is itself a first-class or home-rule city, unless such selections fall within 2 miles from the boundary of another first-class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan.

City of Nenana (On Reconsideration), 106 IBLA 26 (Dec. 7, 1988)

State-Selected Lands

The Department of the Interior does not retain jurisdiction to hear a contest against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State of Alaska following commencement of the Native's use and occupancy. Sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), confirming all tentative approvals of State land selections subject to valid existing rights, conveyed the lands in dispute out of Federal ownership thus ousting the Department's jurisdiction to adjudicate title in a contest proceeding.

Elizabeth G. Cook, Eva Osterhaus, 90 IBLA 152 (Dec. 30, 1985)

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(ii), (iv), and (v). This segregation arises as a result of the

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedState-Selected Lands--Continued

filing of a state selection and operates independently of the notation rule.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

Under sec. I.C.(2)(b) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet area, the Secretary is authorized to place lands into a pool for selection by Cook Inlet Region, Inc., if the State of Alaska concurs. In sec. 606(d)(5) of the Alaska Railroad Transportation Act of 1982, Congress provided that the concurrence required of the State as to the inclusion of any property in the pool shall be deemed obtained unless the State advises the Secretary in writing that it requires the property for a public purpose. By providing that transfer to the pool would occur unless notice were given that the State requires the property "for a public purpose," Congress opened to inquiry the State's basis for objecting to the transfer. As a result, BLM may properly require the State to demonstrate that it requires an out-of-region parcel for a public purpose in order for the State to block inclusion of the parcel in the CIRI selection pool.

State of Alaska, 106 IBLA 160 (Dec. 20, 1988) 95 I.D. 304

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedVillage Selections

Where the facts and law are comprehensively set forth in an Administrative Law Judge's decision recommending reversal of easements reserved under authority of sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Chitina Native Corp., 85 IBLA 311 (Mar. 21, 1985)

Where the facts and the law are properly set forth in an Administrative Law Judge's decision recommending affirming a BLM decision to reserve a site easement pursuant to sec. 17(b) of the Alaska Native Claims Settlement Act, the recommended decision may be adopted as the final decision of the Board.

Tetlin Native Corp., 86 IBLA 325 (May 16, 1985)

Land occupied and actually used as a school by the Bureau of Indian Affairs, reduced to the smallest practicable tract, is not "public land" within the definition of sec. 3(e) of ANCSA, and thus is not available for village selection even though it may be anticipated that the school will be "phased out" at some future time.

Nunakauiak Yupik Corp., 87 IBLA 313 (June 25, 1985)

Under the Alaska Native Claims Settlement Act, the key prerequisite to a village corporation's selection of land was the land's availability for withdrawal under sec. 11(a), 43 U.S.C. § 1610(a) (1982). If not so withdrawn, it could not be selected by a village corporation under sec. 12(a), 43 U.S.C. § 1611(a) (1982).

The provision "withdrawn or reserved for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982),

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedNATIVE LAND SELECTIONS--ContinuedVillage Selections--Continued

includes not only lands formally withdrawn but also embraces those lands which have been effectively reserved for such use.

The language "for national defense purposes" in sec. 11(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(a) (1982), does not create a special category of lands within those under control of the Department of Defense, but rather serves to distinguish lands held by the military from those held by other Federal agencies.

Sitnasuak Native Corp., 91 IBLA 86 (Mar. 11, 1986)

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

The smallest practicable tract of land occupied and actually used by the Bureau of Indian Affairs as a school during the period of time it was available for selection by a Native village corporation does not come within the definition of "public lands" under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), and thus is not available for Native village selection even though the Bureau entered into an agreement during the selection period to transfer use of the land to a State agency.

Olgoonik Corp., Inc., 95 IBLA 80 (Dec. 29, 1986)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

NATIVE LAND SELECTIONS--Continued

Village Selections--Continued

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982).

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of-way only if the public interest outweighs the objections of the village.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

NAVIGABLE WATERS

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration)  
100 IBLA 50 (Nov. 24, 1987)  
94 I.D. 422

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

PRIMARY PLACE OF RESIDENCE

Criteria

In order to establish a primary place of residence there must be evidence that the applicant resided on the tract applied for as a primary place of residence on a regular or seasonal basis for a substantial period of time.

Where a Native has resided in a dwelling for a 3-1/2 week period (including the critical date, Aug. 31, 1971) on land subsequently applied for as a primary place of residence, such occupancy does not meet the regulatory requirements for conveyance because it is neither regular nor seasonal, nor for a substantial period of time.

Rose Perley Miller, 93 IBLA 147 (July 30, 1986)

In order for a parcel of land to qualify as a Native's primary place of residence under sec. 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(5) (1982), and the applicable regulations, among other requirements, the land claimed must be used and occupied as of Aug. 31, 1971, and a "dwelling" must be located on the claimed tract. A dwelling located on a tract separate from the tract claimed as the primary place of residence will not satisfy the "dwelling" requirement of sec. 14(h)(5) and 43 CFR 2653.8-2(b)(1).

"Dwelling." Under 43 CFR 2653.8-2(b)(1) a "dwelling" is a house or other structure in which a person or persons live, reside, or habitate. A structure useable only as an emergency shelter is not a dwelling for purposes of this regulation.

Since, under 43 CFR 2653.8-1, an applicant for a primary place of residence is only entitled to such land as was actually used or occupied on Aug. 31, 1971, the applicant must show the requisite use or occupancy for each aliquot 40-acre part of the lands applied for.

United States Forest Service, 98 IBLA 157 (June 24, 1987)



ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedPRIMARY PLACE OF RESIDENCE--ContinuedRelinquishment

Under the Alaska National Interest Lands Conservation Act, Native allotment applications pending before the Department on or before Dec. 18, 1971, were approved, subject to valid existing rights, and certain exceptions. Approval does not apply where an allotment has been knowingly and voluntarily relinquished. An evidentiary hearing will be ordered where conflicting allegations give rise to an issue as to whether a relinquishment was knowing and voluntary.

Katherine C. (Zimin) Atkins, 95 IBLA 391 (Feb. 24, 1987)

WITHDRAWALS AND RESERVATIONSGenerally

Under sec. 3(e) of ANCSA, as amended, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude land actually used in connection with the administration of a Federal installation during the period of time the land was available for selection by the Native village corporation from an interim conveyance to a Native village corporation under sec. 16(b) of ANCSA, as amended, 43 U.S.C. § 1615(b) (1982).

Pursuant to 43 CFR 2655.2(b)(3)(v), a tract of land used by private logging interests under a permit issued by the Forest Service is excludable from interim conveyance to a Native village corporation under sec. 3(e) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1602(e) (1982), if the use of the land has a direct, necessary, and substantial connection to the purpose of the holding agency and the lands are not used primarily to derive revenue.

Kake Tribal Corp., 85 IBLA 165 (Feb. 25, 1985)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--ContinuedWITHDRAWALS AND RESERVATIONS--ContinuedGenerally--Continued

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Withdrawals for Native SelectionGenerally

A decision finding that certain lands are not "public lands" within the meaning of sec. 3(e) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), and hence not subject to Native village selection, will be affirmed where the record discloses the lands were used in connection with the administration of a Federal installation during the selection period, notwithstanding the fact the use was abandoned after the selection period.

Unalakleet Native Corp., 93 IBLA 190 (Aug. 15, 1986)

AMERICAN INDIAN RELIGIOUS FREEDOM ACT

When recommending that the State of Montana approve a mining plan of operations pursuant to the Surface Management Regulations in 43 CFR 3809 and a memorandum of understanding between BLM and the State of Montana, BLM did not fail to comply with the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982). The record shows that BLM made a good faith effort to obtain and consider the views of the Indians and determined, based on the record, that the operations set out in the mining plan would not unnecessarily interfere with American Indian religious values and practices and would not prevent the Indians



# AMERICAN INDIAN RELIGIOUS FREEDOM ACT--Continued

from access to their religious sites. BLM's action was in accord with the policy and requirements of AIRFA.

The Blackfeet Tribe, 103 IBLA 228 (July 26, 1988)

## APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970--if included in this Index.)

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Agnes Mayo Moore, 91 IBLA 343 (Apr. 21, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 226 (June 24, 1986)

Don G. Carpenter, 94 IBLA 7 (Sept. 18, 1986)

Andre C. Capella, 94 IBLA 181 (Oct. 29, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

B. L. & Norma Jean Newman et al., 92 IBLA 314 (June 26, 1986)

# APPEALS--Continued

An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly dismissed as moot only if the Board can provide no effective relief.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986) 93 I.D. 285

The failure to file a timely appeal from a decision approving an interim conveyance of land to a Native corporation precludes a later appeal as to that land. Such an appeal must be dismissed.

City of Klawock, 94 IBLA 107 (Oct. 7, 1986)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be

APPEALS--Continued

treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeFavre, 95 IBLA 26 (Dec. 12, 1986)

GENERALLY

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

APPEALS--ContinuedGENERALLY--Continued

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally cognizable interest has been adversely affected by denial of the protest.

Donald Pay, 85 IBLA 283 (Mar. 13, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our ecoSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)

APPEALS--ContinuedGENERALLY--Continued

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify; that the claims could be mined profitably; and that the transcript was inadequate and incorrect; but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

APPEALS--ContinuedGENERALLY--Continued

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Fred J. Schikora, 89 IBLA 251 (Oct. 31, 1985)

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)



APPEALS--ContinuedGENERALLY--Continued

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal may be dismissed.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

A person who wishes to appeal from a determination that an oil and gas lease has terminated by operation of law for failure to submit the rental amount due must file a notice of appeal within 30 days after the date of service of the determination. If an appellant fails to file a timely notice of appeal in accordance with 43 CFR 4.411, the issue of termination will not be considered in an appeal from a subsequent decision denying petition for reinstatement.

PRM Exploration Co., 90 IBLA 63 (Dec. 10, 1985)  
92 I.D. 617

APPEALS--ContinuedGENERALLY--Continued

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

APPEALS--ContinuedGENERALLY--Continued

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)  
93 I.D. 13

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to adjoining landowners who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 93 IBLA 155 (July 31, 1986)

An appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an order of this Board requiring a showing of cause why the appeal should not be dismissed.

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within

APPEALS--ContinuedGENERALLY--Continued

the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Altman, 93 IBLA 265 (Aug. 28, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)  
93 I.D. 394

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

APPEALS--Continued

## GENERALLY--Continued

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBLA 97 (Feb. 3, 1987)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

APPEALS--Continued

## GENERALLY--Continued

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status



APPEALS--Continued

## GENERALLY--Continued

within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark

APPEALS--Continued

## GENERALLY--Continued

on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

When a Bureau of Land Management decision has been properly appealed to the Board of Land Appeals by an adversely affected party, the Bureau loses jurisdiction over the case and has no authority to take further dispositive action on the subject matter of the appeal. Should the Bureau desire to take such action, it may request that the Board take the action or ask the Board to restore the Bureau's jurisdiction by remanding the case for it to take the action.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

APPEALS--ContinuedGENERALLY--Continued

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. An appeal by a stockholder of a corporation is properly dismissed for lack of standing where the issue raised by appellant is the ownership of the corporation and the decision does not purport to adjudicate that issue.

Greg Williams, 98 IBLA 303 (July 29, 1987)

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to

APPEALS--ContinuedGENERALLY--Continued

submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price Index (CPI) is properly deferred 1 year when a rental rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. MacKie, 7 OHA 138 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice

APPEALS--ContinuedGENERALLY--Continued

of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

APPEALS--ContinuedGENERALLY--Continued

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

Where an Administrative Law Judge has made an interlocutory ruling that an applicant's failure to file its application for review timely did not deprive him of jurisdiction over the matter, and where the judge has considered and denied OSMRE's request that this question be certified to the Board of Land Appeals under 43 CFR 4.1124, OSMRE's petition for permission to appeal the interlocutory ruling to the Board under 43 CFR 4.1272(a) is properly granted, because resolution of this question will materially advance disposition of the case.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

Where BLM conditions its decision that an unpatented mining claim is abandoned and void upon an opportunity to produce evidence of timely filing within the following 30-day period, the appeal period does not commence until the day after the end of the stipulated compliance period.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)



APPEALS--ContinuedGENERALLY--Continued

The effect of 43 CFR 4.21(a) is only to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal. It does not have the effect of suspending BLM's authority to act on matters that are functionally independent from the subject of the appeal. The unavailability of some lands in a noncompetitive over-the-counter lease offer has no effect on the validity of the offer for the remainder of the lands in the offer. Thus, the question of the correctness of BLM's rejection of part of an offer is independent from the question of the status of the offer for the remainder of the lands that it covers, so that BLM is free to accept the offer for the remainder notwithstanding that the time for appealing the partial rejection has not expired.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

Under 30 CFR 775.11(a), a request for a hearing must be filed within 30 days after an applicant or permittee is notified of OSMRE's final decision on an application for a permit revision. The timely filing of a request for a hearing is jurisdictional and failure to file the request within the time allowed requires dismissal of the proceedings.

Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement & Peabody Coal Co., 103 IBLA 44 (June 27, 1988)

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

APPEALS--ContinuedGENERALLY--Continued

A "petition to intervene" in a pending appeal is properly denied where the party seeking to participate does not offer comments on the decision on appeal, but instead challenges an earlier decision by BLM that has been previously considered by the Board of Land Appeals.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

Rental rate adjustments for Government-furnished quarters will be upheld where appellant fails to submit evidence establishing error in the adjustments.

Appeal of the National Federation of Federal Employees Local #2044, 7 OHA 231 (Aug. 17, 1988)

Rental rate adjustments for Government-furnished quarters will be revised where the record on appeal reveals errors which necessitate such corrective action.

In the Matter of the Rental Rate Appeal of Mr. Marvis V. Averett, 7 OHA 235 (Sept. 1, 1988)

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

APPEALS--ContinuedGENERALLY--Continued

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan approved by the authorized officer as required by regulation at 43 CFR 3162.3-4(a). Where the record on appeal from a decision requiring an operator to replug a well discloses a material issue of fact regarding whether the well was properly plugged, the case is properly referred for an evidentiary hearing pursuant to 43 CFR 4.415.

Coleman Oil & Gas, Inc., 104 IBLA 363 (Sept. 27, 1988)

Generally, the Board will dismiss an appeal challenging the results of a dependent resurvey if the lands on both sides of the disputed boundary have been patented to private owners prior to the time the protest is lodged.

A resurvey conducted by the Cadastral Survey is improperly undertaken to the extent it establishes boundaries between private tracts of land if the survey of those boundaries is not necessary to establish a boundary between private and Federal lands. Once patent has been issued, the rights of the patentees are fixed and the Government has no power to interfere with such rights by resurveying the boundaries.

James S. Mitchell, William Dawson, 104 IBLA 377 (Sept. 27, 1988)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that even assuming everything the appellant alleges is true, under no set of circumstances can the appellant prevail, the notice will be addressed without additional briefing.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

APPEALS--ContinuedGENERALLY--Continued

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

James C. Mackey, 104 IBLA 393 (Oct. 4, 1988)

Approval or amendment of a resource management plan are not actions appealable to the Board of Land Appeals. However, any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision for implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Albert Yparraguirre, 105 IBLA 245 (Nov. 4, 1988)

"Adverse party." An "adverse party" to a case is one who will be disadvantaged if the agency decision is appealed and if the appellant prevails. A party who is determined by BLM to have priority for two oil and gas leases over another party will be disadvantaged if the latter prevails on an appeal to the Board of Land Appeals and should be named as an "adverse party" in the decision rejecting the latter's offer.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

APPEALS--ContinuedGENERALLY--Continued

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

APPEALS--ContinuedGENERALLY--Continued

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

Pursuant to 43 CFR 4.1270(b), a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding which is not timely filed must be denied.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

Under 43 CFR 4.410, the timely filing of a notice of appeal is necessary to establish jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department, and the Board will not consider the validity of such decisions in a later appeal. The failure to file a timely appeal from decisions declaring mining claims abandoned and void precludes the Board from considering the validity of the claims in an appeal from the rejection of a patent application for those claims.

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)



APPEALS--ContinuedGENERALLY--Continued

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline to entertain arguments directed to MMS' authority to assess interest.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was

APPEALS--Continued.GENERALLY--Continued

filed within 30 days after service of the decision upon the party or parties of record.

Lew Landers, 109 IBLA 391 (June 26, 1989)

The Board of Indian Appeals will not consider issues which an appellant has not pursued on appeal.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

A notice of appeal from a decision of the Commissioner of Indian Affairs that is not timely filed will be dismissed.

John D. Baker v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 218 (Aug. 3, 1989)

A mining claimant has standing to appeal from decisions declaring his claims invalid.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

APPEALS--ContinuedGENERALLY--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

A person with no legal status in an appeal will not be heard to object to a settlement agreement reached between the parties.

San Juan County, Washington v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 12 (Oct. 5, 1989)

An appeal from a decision approving an application for a recreational permit for a motor vehicle trip through Arch Canyon, Utah, could not be dismissed as moot even though the challenged event had occurred, where issues raised by the appeal were capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

APPEALS--ContinuedGENERALLY--Continued

When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement.

Clive Kincaid, 111 IBLA 224 (Oct. 17, 1989)

An appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal.

Craig C. Downer, 111 IBLA 339 (Oct. 31, 1989)

JURISDICTION

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal and a motion to assume jurisdiction, or other document requesting Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to trigger the Board's jurisdiction automatically after the expiration of the time period.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

APPEALS--ContinuedJURISDICTION--Continued

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

APPEALS--ContinuedJURISDICTION--Continued

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600.

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction. The Board will not consider challenges to policy statements issued by BLM, or give opinions on abstract propositions.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the



APPEALS--ContinuedJURISDICTION--Continued

obligation of the administrative forum to dismiss the proceeding.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

30 CFR 290.7 permits any party to a case adversely affected by a final decision of the Director, Minerals Management Service, to file an appeal with the Board of Land Appeals in accordance with the procedures provided in 43 CFR part 4. Where in an appeal to the Board from a decision of the Director, there is no showing that a particular issue raised by appellant in the appeal before the Board was before the Director for consideration at the time he issued his decision, the appeal to the Board must be dismissed as to that issue, since, in the absence of consideration of and a decision on the issue by the Director, the Board lacks jurisdiction to consider the issue.

Blackhawk Coal Co., 104 IBLA 169 (Sept. 8, 1988)

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

The jurisdiction of the Board of Land Appeals has been delegated by the Secretary of the Interior, and the scope of this Board's authority is stated in 43 CFR part 4. The Board has not been empowered to rule on the merits of an affirmative defense that an appellant is protected under the bankruptcy laws because debt claims were not filed as Proof of Claim with the

APPEALS--ContinuedJURISDICTION--Continued

U.S. Bankruptcy Court. The Bankruptcy Court is the proper forum for a determination on that issue.

Lomax Exploration Co., 105 IBLA 1 (Oct. 7, 1988)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following

APPEALS--ContinuedJURISDICTION--Continued

classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an

APPEALS--ContinuedJURISDICTION--Continued

administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

APPLICATIONS AND ENTRIESGENERALLY

Where an application for a special use permit is filed after a deadline imposed by the Bureau of Land Management for compelling administrative reasons, the application is properly rejected.

Ken Warren Outdoors, Inc., 85 IBLA 354 (Mar. 25, 1985)

Under 43 CFR 2561.1(c), a Native allotment applicant must describe "as accurately as possible" available lands he claims to have used or occupied in compliance with the Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), if the lands were unsurveyed under the rectangular survey system. Where the description provided "is ambiguous" so that the claimant's entitlement to a part of a trail is not clearly adjudicated under the Act notwithstanding that an allotment of a tract of the land was approved, the decision to grant the allotment will be set aside and the case remanded to determine whether the application included the trail in question and to review the claimant's entitlement to that trail as part of his allotment.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) <sup>92 I.D. 578</sup>

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested

APPLICATIONS AND ENTRIES--ContinuedGENERALLY--Continued

administrative costs as required by 43 CFR 2720.1-3(b)(1), the application is properly rejected.

Niles H. Thim Corp., 93 IBLA 128 (July 29, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Harlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment,

APPLICATIONS AND ENTRIES--ContinuedGENERALLY--Continued

there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

The rights of a holder of a prospecting permit are conditioned upon compliance with the requirements imposed by regulation and the permit itself. BLM may properly reject a preference right lease application filed pursuant to the prospecting permit on the basis that the exploration information submitted to support a discovery of a valuable mineral was not obtained under an approved exploration plan as required by regulation and permit provisions.

Lucky II Mines, 102 IBLA 55 (Apr. 14, 1988)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a power-site classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and



APPLICATIONS AND ENTRIES--ContinuedGENERALLY--Continued

thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

The notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed, and gives the patentee the protection of a judicial forum.

A protest of the acceptance of a notice of location of a homestead which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest

APPLICATIONS AND ENTRIES--ContinuedGENERALLY--Continued

against the validity of such entry" so as to preclude application of the Act.

A field investigation report prepared by BLM is not a protest.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

BLM properly denied approval of two free-use applications for sand and gravel aggregate excavation within a wilderness study area where impacts of the excavation could not be rendered substantially unnoticeable before a final wilderness designation was scheduled to be made pursuant to 43 U.S.C. § 1782 (1982).

California Dept. of Transportation, 111 IBLA 251 (Oct. 25, 1989)

APPLICATIONS AND ENTRIES--ContinuedGENERALLY--Continued

When an application for a mineral material sale is received which covers land embraced in an unpatented mining claim, which claim is not manifestly invalid for a reason appearing of record, BLM should first make a preliminary determination whether it believes that a basis exists for concluding that the claim is invalid and, if such a determination is in the affirmative, BLM should then decide whether the benefits to be obtained by a successful challenge to the mining claim outweigh the administrative costs in pursuing a mining claim contest.

Roger B. Woody, 112 IBLA 51 (Nov. 20, 1989)

FILING

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

Under 43 CFR 3112.2-2(b), each Part B application form must be accompanied by a single remittance sufficient to cover the filing fee of \$75 and first year's rental payment for each parcel included in the application. If the remittance is insufficient, the entire filing is properly deemed unacceptable because an insufficient remittance is not a technical, or non-substantive, defect.

CNG Producing Co., 102 IBLA 210 (May 10, 1988)

When BLM decides to issue a noncompetitive oil and gas lease, it is required to issue the lease to the person first making application for the lease if that person is qualified to hold a lease. Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Sec. 1274.14 of the BLM Manual sets out binding Bureau policy on how to time and date stamp documents, including over-the-counter lease offers received through the U.S. Postal Service or

APPLICATIONS AND ENTRIES--ContinuedFILING--Continued

commercial delivery service, and BLM decisions affording priority on the basis of this policy will be affirmed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through the U.S. Postal Service shall be time and date stamped as of the time and date of receipt, with the sole exception that any offer received in the first scheduled receipt of mail during the business day is properly time and date stamped as of the posted beginning hour for the day. In the absence of proof that an offer was in fact received by BLM in the first scheduled receipt of mail, BLM's action to time and date stamp the offer as of the time it was received will not be disturbed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through a commercial delivery source shall be time and date stamped as of the time and date it is actually received.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

PRIORITY

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

RELINQUISHMENT

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an

APPLICATIONS AND ENTRIES--ContinuedRELINQUISHMENT--Continued

intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as un rebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant.

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 355 (Sept. 15, 1986)

A duty to reexamine the circumstances of the relinquishment of a Native allotment application in the face of an allegation that it was involuntary and unknowing, notwithstanding the fact the land was subsequently conveyed out of Federal ownership, is founded on the special fiduciary responsibility of the Secretary of the Interior to Native Americans. Hence, a BLM decision refusing a petition by the heirs of a deceased Native allotment applicant to consider a previously relinquished application on the ground the relinquishment was involuntary and unknowing may be set aside and the case remanded to allow consideration of the circumstances of the relinquishment.

Heirs of William A. Lisbourne et al., 97 IBLA 342 (May 22, 1987)

APPLICATIONS AND ENTRIES--ContinuedRELINQUISHMENT--Continued

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

An evidentiary hearing is ordered where an Alaska Native alleges that a purported relinquishment of her Native allotment application was unknowing and involuntary.

Lucy Lincoln, 102 IBLA 182 (May 5, 1988)

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), is deemed to have exhausted his rights under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

Heirs of George Martinez, Heirs of Arthur Chavez, 103 IBLA 375 (Aug. 15, 1988)



APPLICATIONS AND ENTRIES--ContinuedRELINQUISHMENT--Continued

Generally, BLM has the duty to examine whether a relinquishment of a Native allotment application was knowing and voluntary when the applicant declares it was not. However, where the evidence submitted by the applicant clearly shows, as a matter of law, the invalidity of the claim, it is unnecessary to conduct a factual investigation of the circumstances of the relinquishment.

Jonas Ningaok, 109 IBLA 347 (June 23, 1989)

VALID EXISTING RIGHTS

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

APPRAISALS

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography,

APPRAISALS--Continued

the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp., 85 IBLA 224 (Feb. 28, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920 as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

APPRAISALS--Continued

Where the designated bidder in a proposed sale pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), shows significant discrepancies between the method of appraisal and the appraisal standards adopted by the Department regarding consideration of highest and best use and seller financing in analyzing comparable transactions, the case may be remanded to BLM for a reevaluation of the fair market value of the land.

Byron R. Meyer, 89 IBLA 219 (Oct. 28, 1985)

An appraisal by BLM of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in BLM's appraisal method or fails to show by convincing evidence that charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Glover Communications, Inc., 89 IBLA 276 (Nov. 8, 1985)

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Jancur, Inc., 93 IBLA 310 (Sept. 11, 1986)

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land

APPRAISALS--Continued

Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 4, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the

APPRAISALS--Continued

surface reasonably incident to mining or removal, as that is the interest reserved.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer,  
95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

The Board will not overturn a BLM appraisal of the fair market value of a parcel of land in a conveyance to a color-of-title applicant where BLM considered the amount of land fit for agricultural use (the highest and best use) in comparing sales of comparable parcels and did not consider the unsubstantiated impact on fair market value of future erosion of the parcel. Fair market value is not controlled by acreage alone, but depends upon difference in use, character, and productivity.

A color-of-title applicant is properly accorded an equitable deduction from the appraised fair market value of the claimed parcel of land based on the longevity of the applicant's colorable title figured from the date of acquisition by the applicant to the date good faith possession ceased, as well as an equitable deduction based on the length of the applicant's chain of title.

A color-of-title applicant is not entitled to an equitable deduction from the appraised fair market value of the claimed parcel of land based on the increased costs of financing the original purchase due to discovery of a defect in title or any supposed further doubt as to Federal title.

Weathersby Godbold Carter, Richard T. Harriss, III,  
97 IBLA 108 (Apr. 29, 1987)

APPRAISALS--Continued

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--  
Indian Affairs (Operations), 15 IBLA 179 (May 15, 1987)  
94 I.D. 172

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the original rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private



APPRAISALS--Continued

arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

A rental adjustment to a lease of Indian land, which is based on an appraisal employing a sales-price comparison methodology, will be affirmed if it is reasonable that is, if it is supported in law and by substantial evidence.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 249 (Aug. 5, 1987)

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

APPRAISALS--Continued

Sec. 504(g) of the Federal Land Policy and Management Act of 1976 and 43 CFR 2803.1-2(c)(3), permit BLM to charge less than the fair market rental value if the right-of-way holder provides a valuable benefit to the public or to the programs of the Secretary without charge or at reduced rates.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal where an appellant fails to show the rental rate set by BLM is excessive.

Harvey Singleton, 101 IBLA 248 (Feb. 29, 1988)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show the rental rate is excessive. Absent a showing that appraisal methods used to set the rental rate are incorrect, a BLM appraisal may, in general, only be rebutted by another appraisal.

Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (Feb. 29, 1988)

A party holding a right-of-way issued under the Act of May 4, 1911, may choose to appeal a rental reappraisal conducted under 43 CFR 2802.1-7(e) (1979), without first pursuing a factual hearing. In such a circumstance, upon obtaining a written waiver of the right to a hearing, BLM may issue a decision imposing the reappraised rental, subject to appeal to the Board of Land Appeals.

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of a right-of-way rental or the appellant shows that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Increased rental charges for a right-of-way issued under the Act of Mar. 4, 1911, and reappraised under

APPRAISALS--Continued

43 CFR 2802.1-7(a) (1979), are imposed "commencing with the ensuing charge year." The ensuing charge year is the rental year which begins following the date of the decision giving notice of the reappraisal and an opportunity for a hearing.

Pacific Bell, 104 IBLA 66 (Aug. 25, 1988)

An appraisal of the fair market value of a right-of-way will not be set aside on appeal if appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that charges are excessive. In the absence of a showing that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

An application for a reduction in the fair market rental value charged for a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), on the ground of hardship, pursuant to the regulation at 43 CFR 2803.1-2(b)(2)(iv), 52 FR 25819 (July 8, 1987), may be adjudicated for an existing right-of-way where the holder has tendered the estimated advance rental deposit demanded by BLM.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

Generally, the Board of Land Appeals will uphold a BLM appraisal of a right-of-way unless it can be shown that BLM has failed to apply the proper criteria when calculating the fair market value right-of-way rental or the resulting charges are shown to be excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Generally, the proper appraisal analysis method for determining the fair market rental value of non-linear rights-of-way is a site-specific analysis of comparable sites with adjustment for variances in the site conditions.

BLM may reduce rental payments for communication site rights-of-way if it determines that the imposition of the fair market value rental would cause an

APPRAISALS--Continued

undue hardship on the right-of-way holder or applicant.

High Country Communications, Inc., 105 IBLA 14 (Oct. 11, 1988)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Communications Enterprises, Inc., 105 IBLA 132 (Oct. 26, 1988)

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

Exxon Corp., 106 IBLA 207 (Dec. 21, 1988)

APPRAISALS--Continued

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunications site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

Where BLM has set the annual rental charges for a telecommunications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is

APPRAISALS--Continued

properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)



APPRAISALS--Continued

A Bureau of Indian Affairs appraisal of tribal timber resources conducted for the purpose of evaluating proposed stumpage rates will not be overturned unless it is shown to be unreasonable.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBLA 258 (Aug. 25, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100

APPRAISALS--Continued

percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

Where a BLM determination of the fair market rental value of a communications site right-of-way is based on a market study appraisal which does not comport with a proper application of the comparable lease method of appraisal and fails to provide data and analysis sufficient to determine the comparability of the right-of-way and private leases for similar communications use, the Board will vacate the value determination and remand the case for reappraisal.

Joyce Communications, Inc., 111 IBLA 255 (Oct. 25, 1989)

A linear right-of-way for an electric power line is subject to administration pursuant to Departmental regulations published at 43 CFR Subpart 2803. A linear rental rate for an electric power right-of-way was correctly calculated by using a schedule as provided by 43 CFR 2803.1-2(c)(1)(i), even though the rental increased by more than 100 percent over a rental deposit paid, where the amount of increase was phased in pursuant to provision of 43 CFR 2803.102(c)(2)(i).

Keith P. Carpenter, 112 IBLA 101 (Nov. 28, 1989)

An appraisal of fair market rental value for a nonmineral lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Gerald L. & Ruby A. Overstreet, 112 IBLA 211 (Dec. 19, 1989)

APPRAISALS--Continued

Under 43 CFR 2803.1-2(c)(1)(v), the authorized officer is required to use the fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i) in establishing the rental for a linear right-of-way, unless the authorized officer determines that a substantial segment or area within the right-of-way exceeds the zone(s) value by a factor of 10 and in the judgment of the authorized officer, the expected valuation is sufficient to warrant a separate appraisal. When BLM makes the determination required by the regulation, it may properly calculate the rental for a linear right-of-way on the basis of an appraisal.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Great Co., 112 IBLA 239 (Dec. 21, 1989)

APPROPRIATIONS

(See also Expenditures, Funds--if included in this Index.)

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987)  
94 I.D. 120

Civil penalties and late payment interest assessed against Outer Continental Shelf lessees are not "bonuses, rents, . . . royalties, or other revenues (derived from any bidding system . . .)" within the meaning of 43 U.S.C. § 1337(g)(2). Therefore, they may not be shared with coastal states and must be deposited in miscellaneous receipts in the Treasury.

Under 43 U.S.C. § 1337(g)(2), the Department has no authority to pay interest to a coastal state on

APPROPRIATIONS--Continued

revenues held in the suspense account pending resolution of errors and disputes.

Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act, M-36956 (Jan. 14, 1988)  
95 I.D. 203

ATTORNEY'S FEESGENERALLY

The position of the Government in partially denying a clearing contractor's claims was reasonable and therefore substantially justified where (1) the contracting officer voluntarily awarded the contractor an equitable adjustment for a substantial portion of his claims, thereby indicating that he had made an effort to evaluate the claims before him conscientiously; (2) prior to the contracting officer's decision, the contractor expressly declined to make a claim for the work for which the Board ultimately awarded him partial recovery; (3) the specific industry practice which was the basis for the contractor's award by the Board was alleged for the first time at the oral hearing; (4) the Board's award was equal to only 11 percent of the total amount of the claims appealed to the Board; and (5) the amount awarded by the Board was only 15 percent, or \$461, more than a settlement offer made by the Department counsel approximately 2 weeks before the hearing.

Application for Attorney Fees, Hall Allred, IBCA-2683-F (Nov. 15, 1989)

The position of the Government is not substantially justified where, prior to the contracting officer's decision, the claimant accurately pointed out the governing FAR provision and the reason payment was proper under it; but the contracting officer disregarded the clear intent of the FAR provision and denied payment, forcing an appeal.

Application for Attorney Fees, Northwest Piping, Inc., IBCA-2642-F (Nov. 15, 1989)



ATTORNEY'S FEES--ContinuedGENERALLY--Continued

The position of the Government in denying appellant's termination settlement claim was reasonable and substantially justified where the parties negotiated a settlement agreement, without litigation, including only 18 percent of the claimed direct and indirect costs and profit claimed, and such agreement reimbursed appellant for the expenses incurred during the negotiation period, including loan interest expense, settlement expenses, attorney fees, and Contract Disputes Act interest on the amount awarded.

Application of Russell Drilling Co., Inc., for Fees & Expenses under EAJA, IBCA-2560-F (Nov. 30, 1989)  
96 I.D. 480

CONTRACT DISPUTES ACT OF 1978

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connecting with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in

ATTORNEY'S FEES--ContinuedCONTRACT DISPUTES ACT OF 1978--Continued

appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

The Government's position in contesting a contractor's claim for interest on a disputed construction claim paid pursuant to a settlement agreement was not substantially justified where: (1) the contracting officer ultimately paid the entire amount of the contractor's claim except for interest; (2) the contracting officer's decision denying entitlement to interest on the basis of noncertification was legally in error; (3) the contracting officer's affidavit that he thought interest was included in the settlement agreement had an insufficient basis and was patently inconsistent with other documents in the record; and (4) the appeal file compiled by the contracting officer inexplicably failed to include numerous documents that were essential to the proper resolution of the dispute between the parties, thereby giving rise to questionable assertions by counsel.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)



ATTORNEY'S FEES--ContinuedCONTRACT DISPUTES ACT OF 1978--Continued

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the opposition had been considered and rejected in the underlying decision either explicitly or by implication.

Salisbury & Dietz, Inc. (Application for Attorney Fees),  
IBCA-2382-F (June 23, 1989) 96 I.D. 280

EQUAL ACCESS TO JUSTICE ACTGenerally

The position of the Government in partially denying a clearing contractor's claims was reasonable and therefore substantially justified where (1) the contracting officer voluntarily awarded the contractor an equitable adjustment for a substantial portion of his claims, thereby indicating that he had made an effort to evaluate the claims before him conscientiously; (2) prior to the contracting officer's decision, the contractor expressly declined to make a claim for the work for which the Board ultimately awarded him partial recovery; (3) the specific industry practice which was the basis for the contractor's award by the Board was alleged for the first time at the oral hearing; (4) the Board's award was equal to only 11 percent of the total amount of the claims appealed to the Board; and (5) the amount awarded by the Board was only 15 percent, or \$461, more than a settlement offer made by the Department counsel approximately 2 weeks before the hearing.

Application for Attorney Fees, Hall Allred, IBCA-2683-F  
(Nov. 15, 1989)

ATTORNEY'S FEES--ContinuedEQUAL ACCESS TO JUSTICE ACT--ContinuedGenerally--Continued

The position of the Government is not substantially justified where, prior to the contracting officer's decision, the claimant accurately pointed out the governing FAR provision and the reason payment was proper under it; but the contracting officer disregarded the clear intent of the FAR provision and denied payment, forcing an appeal.

Application for Attorney Fees, Northwest Piping, Inc.,  
IBCA-2642-F (Nov. 15, 1989)

The position of the Government in denying appellant's termination settlement claim was reasonable and substantially justified where the parties negotiated a settlement agreement, without litigation, including only 18 percent of the claimed direct and indirect costs and profit claimed, and such agreement reimbursed appellant for the expenses incurred during the negotiation period, including loan interest expense, settlement expenses, attorney fees, and Contract Disputes Act interest on the amount awarded.

Application of Russell Drilling Co., Inc., for Fees &  
Expenses under EAJA, IBCA-2560-F (Nov. 30, 1989) 96 I.D. 480

Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

ATTORNEY'S FEES--ContinuedEQUAL ACCESS TO JUSTICE ACT--ContinuedApplication and Jurisdiction

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

Prevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connecting with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the Opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the

ATTORNEY'S FEES--ContinuedEQUAL ACCESS TO JUSTICE ACT--ContinuedPrevailing Party--Continued

Opposition had been considered and rejected in the underlying decision either explicitly or by implication. Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connecting with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437



ATTORNEY'S FEES--ContinuedEQUAL ACCESS TO JUSTICE ACT--ContinuedSubstantially Justified--Continued

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees),  
IBCA-2132-F (Oct. 8, 1987)

The Government's position in contesting a contractor's claim for interest on a disputed construction claim paid pursuant to a settlement agreement was not substantially justified where: (1) the contracting officer ultimately paid the entire amount of the contractor's claim except for interest; (2) the contracting officer's decision denying entitlement to interest on the basis of noncertification was legally in error; (3) the contracting officer's affidavit that he thought interest was included in the settlement agreement had an insufficient basis and was patently inconsistent with other documents in the record; and (4) the appeal file compiled by the contracting officer inexplicably failed to include numerous documents that were essential to the proper resolution of the dispute between the parties, thereby giving rise to questionable assertions by counsel.

A&J Construction Co., Inc. (Application for Attorney Fees),  
IBCA-2376-F (Feb. 4, 1988)

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the Opposition filed to the EAJA application are identical in all material respects to the arguments made in the

ATTORNEY'S FEES--ContinuedEQUAL ACCESS TO JUSTICE ACT--ContinuedSubstantially Justified--Continued

Government's posthearing brief and that such arguments and other arguments made by the Government in the Opposition had been considered and rejected in the underlying decision either explicitly or by implication.

Salisbury & Dietz, Inc. (Application for Attorney Fees),  
IBCA-2382-F (June 23, 1989)  
96 I.D. 280

The position of the Government in partially denying a clearing contractor's claims was reasonable and therefore substantially justified where (1) the contracting officer voluntarily awarded the contractor an equitable adjustment for a substantial portion of his claims, thereby indicating that he had made an effort to evaluate the claims before him conscientiously; (2) prior to the contracting officer's decision, the contractor expressly declined to make a claim for the work for which the Board ultimately awarded him partial recovery; (3) the specific industry practice which was the basis for the contractor's award by the Board was alleged for the first time at the oral hearing; (4) the Board's award was equal to only 11 percent of the total amount of the claims appealed to the Board; and (5) the amount awarded by the Board was only 15 percent, or \$461, more than a settlement offer made by the Department counsel approximately 2 weeks before the hearing.

Application for Attorney Fees, Hall Allred, IBCA-2683-F  
(Nov. 15, 1989)

ATTORNEYS

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of



ATTORNEYS--Continued

the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Henry Beavert, 18 IBIA 73 (Dec. 8, 1989)

AVULSION

(See also Boundaries, Public Lands--if included in this Index.)

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

BALD EAGLE PROTECTION ACT

Where the evidence is uncontradicted that respondent possessed a bald eagle (Haliaeetus leucocephalus) after Apr. 25, 1974, a finding of violation and assessment of a penalty of \$5,000 by the Administrative Law Judge will be affirmed; granting the complainant's motion to amend the original notice of violation to conform to the pleadings by substituting "after April 25, 1974,"

BALD EAGLE PROTECTION ACT--Continued

for "during the month of May 1974," was proper where such amendment did not constitute harm or unfair surprise to respondent.

Where the Bald Eagle Protection Act of 1940, as amended, 1972, does not limit the time within which actions may be brought within the Department of the Interior, the statute of limitations contained in 28 U.S.C. § 2462 (1982), which applies only to judicial proceedings, does not bar administrative proceedings under the Act within the Department.

Paul Asper v. U.S. Fish & Wildlife Service, 6 OHA 86 (Nov. 8, 1985)

BOARD OF INDIAN APPEALSGENERALLY

Under the circumstances of this case, when an issue was raised by a party but not addressed by the Bureau of Indian Affairs, the Board of Indian Appeals will remand that issue for initial determination by the Bureau.

Oliver Redfield v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a

BOARD OF INDIAN APPEALS--ContinuedGENERALLY--Continued

short-term order capable of repetition, yet evading review.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986)  
93 I.D. 409

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987)  
94 I.D. 120

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

On Mar. 11, 1987, the Board of Indian Appeals entered an order in Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 132 (1987). Although it is not a normal practice of Departmental appeals boards to publish in the I.D.'s any matter which is not a full opinion complete with headnotes, the Idaho Mining order is included for publication because it vacates a previous decision of the Board of Indian Appeals in Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 11 IBIA 249, 90 I.D. 329 (1983).

Idaho Mining Corp. v. Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 132 (Mar. 11, 1987)  
94 I.D. 68

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

BOARD OF INDIAN APPEALS--ContinuedGENERALLY--Continued

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

A petition for reconsideration based on arguments already considered by the Board of Indian Appeals in its initial decision does not demonstrate extraordinary circumstances warranting reconsideration under 43 CFR 4.315.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 271 (Aug. 19, 1987)

The Board of Indian Appeals will not consider the merits of a moot appeal where there is no showing that it involves a potentially recurring question raised by a short-term order, capable of repetition, yet evading review.

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

JURISDICTION

The Board will exercise its jurisdiction in a matter appealed to it under 25 CFR 2.19(b) only after an appellant has filed with it a notice of appeal, request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing the notice of appeal is, under 43 CFR 4.310(a), the date the notice is mailed.

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

Harold Jones v. Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 124 (Feb. 27, 1985)

David Sohapp, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 100 (Apr. 4, 1986) 93 I.D. 176

The Board of Indian Appeals will not normally consider a legal issue or allegation of fact first raised on appeal. However, when a manifest error has been committed, the Board has the inherent authority of the Secretary to correct that error.

Estate of Philip Malcolm Bayou, 13 IBIA 300 (July 19, 1985)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Under 43 CFR 4.331, the Board of Indian Appeals does not have jurisdiction to review a matter when there has been no final decision by an appropriate official of the Bureau of Indian Affairs.

Florida Tribe of Eastern Creek Indians v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 269 (Oct. 10, 1985)

Neither the Board of Indian Appeals nor the Bureau of Indian Affairs has jurisdiction over issues that are entrusted to tribal courts.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal and a motion to assume jurisdiction, or other document requesting Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to trigger the Board's jurisdiction automatically after the expiration of the time period.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

Baldy & Baldy, Inc. v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 322 (Nov. 14, 1985)



BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

The Board of Indian Appeals is not the proper forum in which to challenge an Indian tribe's interpretation of its own tribal resolutions.

Oliver Redfield v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)  
93 I.D. 13

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

When the official exercising the administrative review functions of the Commissioner of Indian Affairs fails to issue a decision within 30 days from the date an appeal was ripe for decision, the Board of Indian Appeals acquires jurisdiction under the terms of 25 CFR 2.19(b) without regard to whether the decision under review is based upon an exercise of discretion or an interpretation of law.

Quinault Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 2, 1986)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It does not have the authority to award money damages against the Bureau of Indian Affairs.

Charles Stephens v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 154 (July 10, 1986)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA or against an Indian tribe.

Vance Gillette v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 14 IBIA 187 (July 25, 1986)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

An appeal from a decision of a Bureau of Indian Affairs Area Director or the Deputy Assistant Secretary--Indian Affairs (Operations) may properly be before the Board of Indian Appeals even though a related matter has been decided by the Assistant Secretary for Indian Affairs. However, when the parties before the Board are identically situated to those appearing before the Assistant Secretary, and the issues arise from the same transaction and are precisely the same as those decided by the Assistant Secretary, the precedent established by the Assistant Secretary's decision in the similar case is controlling.

Kiowa Business Committee v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 14 IBIA 196 (Aug. 1, 1986)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 2, 1986)

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Theodore B. White v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 142 (Mar. 27, 1987)

Franklin Escalanti v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 290 (Sept. 15, 1989)

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987)  
94 I.D. 120

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987)  
94 I.D. 172

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

The fact that an Indian probate appeal is pending before the Board of Indian Appeals does not give the Board jurisdiction over an allegedly related Bureau of Indian Affairs decision which has no effect on the decision on appeal.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary--Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or any other party.

Joel LeRoy Henderson v. Area Director, Portland Area Office, Bureau of Indian Affairs, 16 IBIA 169 (July 14, 1988)

When an appeal is referred to the Board of Indian Appeals by the Washington office of the Bureau of Indian Affairs, that referral includes the authority to decide the issues raised.

Unless the Department of the Interior is otherwise given authority to review questions of tribal membership, tribes conclusively determine membership for those purposes over which they have complete control. However, when Departmental action is authorized based upon questions of tribal membership, the Department has authority to consider enrollment questions.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

A letter signed by a Bureau of Indian Affairs official which has the effect of denying relief to an appellant is appealable pursuant to 25 CFR part 2 even though the letter states that the official is unable to decide the appeal at that time.

Ojibla Sioux Tribe v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 16 IBIA 201 (Aug. 18, 1988)



BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedures in 25 CFR Part 271.

Under 25 CFR 271.25 and 271.82, jurisdiction to review a declination to contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), rests with the Assistant Secretary--Indian Affairs. Declination to contract issues raised in an appeal pending before the Board of Indian Appeals are properly dismissed and referred to the Assistant Secretary.

The Tule River Indian Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 21 (Dec. 7, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

The Board of Indian Appeals lacks authority to review a decision of a Bureau of Indian Affairs official insofar as it is based on the exercise of discretion. However, the Board has authority to determine whether proper procedures were followed in reaching the decision.

Angelita Aunko Hamilton v. Acting Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 152 (June 21, 1989)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

City of Eagle Butte, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 192 (July 25, 1989) 96 I.D. 328

Naomi Haikey Eades v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 198 (July 26, 1989)

Day County, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 204 (July 26, 1989)

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against officials of the Bureau of Indian Affairs for their incorrect interpretation of regulations.

Esthervon (Kee) Spencer v. Navajo Area Director, Bureau of Indian Affairs, 17 IBIA 226 (Aug. 17, 1989)

The determination whether to approve stumpage rates under a timber sale contract between a tribe and its tribal forest enterprise is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

In reviewing a decision of the Bureau of Indian Affairs concerning whether land held in Indian trust or restricted status should be partitioned, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Ritho Romo v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 16 (Oct. 5, 1989)

BOARD OF INDIAN APPEALS--ContinuedJURISDICTION--Continued

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 31 (Oct. 20, 1989)

Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 67 (Dec. 5, 1989)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lower Elwha Tribe v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 50 (Nov. 8, 1989)

Caddo Indian Tribe of Oklahoma v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 63 (Nov. 16, 1989)

Stillaguamish Tribe v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 89 (Dec. 20, 1989)

BOARD OF LAND APPEALS

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and

BOARD OF LAND APPEALS--Continued

decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

BOARD OF LAND APPEALS--Continued

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)



BOARD OF LAND APPEALS--Continued

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986) 93 I.D. 394

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1264(c) (1982).

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986) 93 I.D. 417

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

BOARD OF LAND APPEALS--Continued

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2. Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35 96 IBLA 19 (Feb. 26, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

A party asserting a claim of estoppel based on a misrepresentation must be ignorant of the true facts and his reliance on the misrepresentation must be reasonable under the circumstances. Where appellant knew certain oil and gas leases were allegedly expired for lack of production from a communitized well, BLM will not be estopped to hold the leases expired based on a representation of a BLM employee without knowledge of the production status that, based on the records, the leases were in effect.

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

BOARD OF LAND APPEALS--Continued

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

The Board of Land Appeals has expressly ruled that, as a precondition for evoking the defense of estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision.

Enfield Resources, 101 IBLA 120 (Feb. 8, 1988)

Cyprus Western Coal Co., 103 IBLA 278 (Aug. 3, 1988)

The Board of Land Appeals must defer to policies announced by the Secretary of the Interior.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR part 1600.

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over

BOARD OF LAND APPEALS--Continued

BLM except in the context of an actual case in controversy over which the Board has jurisdiction. The Board will not consider challenges to policy statements issued by BLM, or give opinions on abstract propositions.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

If an appellant's notice of appeal did not include a statement of reasons for the appeal, under 43 CFR 4.412(a), the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. However, under 43 CFR 4.22(f), the Board may extend the time for filing a statement of reasons. Under 43 CFR 4.402(a), failure to file the statement of reasons within the time allowed (either by 43 CFR 4.412(a), or by the Board in an order granting an extension) subjects the appeal to summary dismissal. Where no statement of reasons is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Robert L. True (d.b.a. Comanche Enterprises), Petroleum Research Corp., et al., SATELLITE 8303116, 101 IBLA 320 (Mar. 17, 1988)

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a *de novo* review of the record to determine whether the Administrative Law Judge's decision is correct.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board

BOARD OF LAND APPEALS--Continued

is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

An alleged misrepresentation by BLM of mining claim recordation requirements is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to explicit provisions of the governing Federal statute and Departmental regulations. Furthermore, a claim of estoppel based on appellants' vague allegations that they made the filing "on the instruction from the BLM office" fails, because appellants have not established that BLM made a crucial misstatement in an official decision or otherwise engaged in any "official misconduct."

Henry E. Krizman et al., 104 IBLA 9 (Aug. 15, 1988)

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

When the Board of Land Appeals reduces the number of points assigned for a violation to fewer than 30, and that violation is not contained in a cessation order, in accordance with 30 CFR 723.12(c), the assessment of a civil penalty is discretionary and the factors in 30 CFR 723.13(b) are to be taken into consideration.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988)  
95 I.D. 181

BOARD OF LAND APPEALS--Continued

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

James C. Mackey, 104 IBLA 393 (Oct. 4, 1988)

Where an operator begins excavation of coal on Federal lands without a Federal permit, negotiates with OSMRE to suspend enforcement action pending litigation in Federal court of the need for a Federal permit, and ceases operations in reliance upon the agreement, OSMRE is bound by the terms of the agreement made with the operator and may not issue a notice of violation for conditions created by the agreement itself.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 53 (Oct. 17, 1988)

Approval or amendment of a resource management plan are not actions appealable to the Board of Land Appeals. However, any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Albert Yparraquirre, 105 IBLA 245 (Nov. 4, 1988)



BOARD OF LAND APPEALS--Continued

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director of the Bureau of Land Management, whose decision is final for the Department. Nor does the Board possess authority to review land classification determinations made by BLM. However, actions on applications following classification of land and decisions which implement a management plan or amendment are appealable to the Board.

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)

The Board of Land Appeals does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan or land classification determinations rendered by BLM. Because a resource management plan establishes management policy, its approval is subject only to protest to the Director, BLM, whose decision is final for the Department. On the other hand, actions on applications following

BOARD OF LAND APPEALS--Continued

classification of land and decisions which implement a resource management plan or amendment are appealable to the Board.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an administrative survey which the Forest Service uses in managing the National Forests.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

# BOARD OF LAND APPEALS--Continued

The motivation of the Forest Service in seeking the initiation of a contest against a mining claim located on National Forest lands is irrelevant, and once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim and the Bureau of Land Management has determined that the elements of a contest are present, it is not the function of the Board of Land Appeals to inquire into the reasons or the justifications for the initiation of such a proceeding.

United States v. Bruce V. Opperman, 111 IBLA 152 (Oct. 2, 1989)

## BOUNDARIES

(See also Accretion, Avulsion, Public Lands, Reliction, Surveys of Public Lands--if included in this Index.)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

# BUREAU OF INDIAN AFFAIRS

(See also Indian Probate--if included in this Index.)

## GENERALLY

The Soldiers' and Sailors' Civil Relief Act, by 50 U.S.C. § 525 (1982), applies to actions taken by the Bureau of Indian Affairs.

Clyde R. Arcoren, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 307 (Oct. 29, 1985)

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

The Bureau of Indian Affairs has the right to interpret tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

It is axiomatic that the Bureau of Indian Affairs has a responsibility to interpret Federal regulations in carrying out its duties under those regulations.

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

BUREAU OF INDIAN AFFAIRS--ContinuedGENERALLY--Continued

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987)  
94 I.D. 120

Confusion and potentially conflicting decisions would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

Bureau of Indian Affairs agency Superintendents are not empowered by 25 CFR 115.11(b) to authorize disbursements from the Individual Indian Money account of a deceased Indian for funeral expenses without the approval of an Administrative Law Judge (Indian Probate).

In the Matter of the Estate of Madeline Bone Wells, 15 IBIA 165 (Apr. 1, 1987)

BUREAU OF INDIAN AFFAIRS--ContinuedGENERALLY--Continued

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

28 U.S.C. § 516 (1982), vests the Department of Justice with authority to control the defense of litigation pending in the United States Claims Court. Bureau of Indian Affairs officials are without authority to override the decisions of Justice Department attorneys concerning conduct of the litigation.

Oglala Sioux Tribe v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 16 IBIA 201 (Aug. 18, 1988)

The Department of the Interior has authority to interpret a tribal constitution with respect to the Secretary's ordinance approval role under the constitution.

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)



BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALSGenerally

Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

Field and area offices of the Bureau of Indian Affairs do not have authority to overturn decisions of the Deputy Assistant Secretary--Indian Affairs (Operations).

Patricia Ann Schoolcraft Patencio v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 150 (May 21, 1985)

Under 43 CFR 4.331, the Board of Indian Appeals does not have jurisdiction to review a matter when there has been no final decision by an appropriate official of the Bureau of Indian Affairs.

Florida Tribe of Eastern Creek Indians v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 269 (Oct. 10, 1985)

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedGenerally--Continued

Neither the Board of Indian Appeals nor the Bureau of Indian Affairs has jurisdiction over issues that are entrusted to tribal courts.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal and a motion to assume jurisdiction, or other document requesting Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to trigger the Board's jurisdiction automatically after the expiration of the time period.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

Under the circumstances of this case, when an issue was raised by a party but not addressed by the Bureau of Indian Affairs, the Board of Indian Appeals will remand that issue for initial determination by the Bureau.

Oliver Redfield v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedGenerally--Continued

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

Except as otherwise specified, the use of Secretarial authority delegated to Bureau of Indian Affairs' agency superintendents is subject to the administrative review procedure set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 79 (Mar. 14, 1986)

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedGenerally--Continued

A letter signed by a Bureau of Indian Affairs official which has the effect of denying relief to an appellant is appealable pursuant to 25 CFR Part 2 even though the letter states that the official is unable to decide the appeal at that time.

Oglala Sioux Tribe v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 16 IBIA 201 (Aug. 18, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

Cecilia Plain Feather v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 26 (Oct. 20, 1989)

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedGenerally--Continued

Regulations in 25 CFR 20.13 provide that, following a request for covered financial assistance, an applicant may either request a hearing within 20 days or file an appeal within 30 days. If an unfavorable decision is rendered after a hearing, an appeal may still be filed.

Sylvester & Shirley LaRocque v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 80 (Dec. 19, 1989)

Acts of Agents of the United States

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Delores Jean DeMarrias Martineau v. Area Director, Billings Area Office, Bureau of Indian Affairs, 16 IBIA 104 (Apr. 4, 1988)

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

Discretionary Decisions

When the official exercising the administrative review functions of the Commissioner of Indian Affairs fails to issue a decision within 30 days from the date an appeal was ripe for decision, the Board of Indian Appeals acquires jurisdiction under the terms of 25 CFR 2.19(b) without regard to whether the decision under review is based upon an exercise of discretion or an interpretation of law.

Under 43 CFR 4.337(b), the Board of Indian Appeals must refer to the Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner of Indian Affairs those issues arising in an appeal before it that are committed to the Commissioner's discretion.

Quinault Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 2, 1986)

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedDiscretionary Decisions--Continued

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

The Board of Indian Appeals does not have jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) which is based solely on the exercise of discretion.

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Assistant Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 2, 1986)

The determination of whether a high bidder is qualified to perform a timber sales contract or whether rejection of a high bid is in the interest of the Indians is a determination requiring the exercise of discretion.

Under 43 CFR 4.337(b), the Board of Indian Appeals must refer to the Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner of Indian Affairs those issues arising in an appeal before it that are committed to the Commissioner's discretion.

Earl Vielle v. Area Director, Billings Area Office, Bureau of Indian Affairs, 15 IBIA 40 (Oct. 30, 1986)

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals



BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedDiscretionary Decisions--Continued

has jurisdiction to review the decision to the extent of the legal conclusions reached.

Navajo Nation v. Acting Deputy Ass't Secretary--  
Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987)  
94 I.D. 172

Under 25 U.S.C. § 1463 (1982), the decision whether to approve a loan from the Indian Revolving Loan Fund is a decision requiring the exercise of discretion.

The Board of Indian Appeals lacks authority to review a decision of a Bureau of Indian Affairs official insofar as it is based on the exercise of discretion. However, the Board has authority to determine whether proper procedures were followed in reaching the decision.

Angelita Aunko Hamilton v. Acting Anadarko Area  
Director, Bureau of Indian Affairs, 17 IBIA 152  
(June 21, 1989)

FilingMandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

Jacqueline Parsons v. Deputy Ass't Secretary--Indian  
Affairs (Operations), 14 IBIA 79 (Mar. 14, 1986)

Tanana Chiefs' Conference, Inc. v. Area Director,  
Juneau Area Office, Bureau of Indian Affairs, 14 IBIA  
87 (Apr. 4, 1986)

Joel LeRoy Henderson v. Area Director, Portland Area  
Office, Bureau of Indian Affairs, 16 IBIA 169  
(July 14, 1988)

Francis Cahoon v. Portland Area Director, Bureau of  
Indian Affairs, 17 IBIA 187 (July 18, 1989)

BUREAU OF INDIAN AFFAIRS--ContinuedADMINISTRATIVE APPEALS--ContinuedFiling--ContinuedMandatory Time Limit--Continued

Stock West, Inc. v. Portland Area Director, Bureau of  
Indian Affairs, 18 IBIA 7 (Oct. 5, 1989)

An appellant who appeals from an alleged failure of a BIA official to act must appeal within a reasonable time after the appellant should have realized that the BIA official is not going to act. Otherwise his appeal will be considered untimely.

Vance Gillette v. Area Director, Aberdeen Area Office,  
Bureau of Indian Affairs, 14 IBIA 187 (July 25, 1986)

An appeal from a Bureau of Indian Affairs decision under 25 CFR Part 2 is timely if the notice of appeal is filed within 30 days after appellant's receipt of the decision being appealed.

Falcon Lake Properties v. Ass't Secretary--Indian  
Affairs, 15 IBIA 286 (Sept. 29, 1987)

A notice of appeal from a decision of the Commissioner of Indian Affairs that is not timely filed will be dismissed.

John D. Baker v. Anadarko Area Director, Bureau of  
Indian Affairs, 17 IBIA 218 (Aug. 3, 1989)

Leases

The Bureau of Indian Affairs has no authority to grant a lease of tribal land when the proper tribal official or governing body has determined not to approve the lease.

Oliver Redfield v. Area Director, Billings Area Office,  
Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Leases--Continued

The role of the Board of Indian Appeals in reviewing a rental adjustment in a lease of Indian land is to determine whether the adjustment is reasonable, that is, whether it is supported by law and substantial evidence. If it is reasonable, the Board will not substitute its judgment for that of the Bureau of Indian Affairs, but the Board must overturn an adjustment that is not reasonable.

Frank Gamble v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 101 (Feb. 5, 1987)

The Bureau of Indian Affairs is not estopped from reversing an approval of a lease document given in error.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

BUREAU OF LAND MANAGEMENT  
(See also Mineral Leasing Act--if included in this Index.)

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance for a safety violation, the failure to have a belt guard on a pumpjack, the Bureau of Land Management may not assess the lessee a penalty for noncompliance if the lessee, acting in good faith, has complied timely with the terms of the order and if the purpose of the order, ensuring safety, has been fulfilled. No penalty will be imposed where the cited "hazard" is so minimal that the risk of actual harm is virtually nonexistent.

Chinook Resources, Inc., 85 IBLA 5 (Jan. 30, 1985)

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing,

BUREAU OF LAND MANAGEMENT--Continued

i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravel an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance with regulatory requirements, i.e., the failure to effectively seal a valve, the applicable regulation, 43 CFR 3163.3, requires that the Bureau of Land Management levy an assessment in the amount provided by the regulation.

Yates Energy Corp., 89 IBLA 150 (Oct. 4, 1985)

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions

BUREAU OF LAND MANAGEMENT--Continued

implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Somont Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986) 93 I.D. 159



BUREAU OF LAND MANAGEMENT--Continued

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

Lycro Energy Corp., 92 IBLA 81 (May 27, 1986)

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

The BLM may properly cite an oil and gas lessee for an INC with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4(b)(1).

Mingo Oil Producers, 94 IBLA 384 (Dec. 8, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions

BUREAU OF LAND MANAGEMENT--Continued

listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IRLA 107 (Jan. 6, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

BUREAU OF LAND MANAGEMENT--Continued

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

A determination to not waive a breach of contract for sales of mineral materials will not be overturned absent a showing that the determination is arbitrary, capricious, or not in the best interest of the Federal Government.

T. Brown Constructors, Inc., 98 IBLA 1 (May 28, 1987)

The BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7(b)(1).

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

BLM has a duty to exercise its authority over mining claims to the end that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

BUREAU OF LAND MANAGEMENT--Continued

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4.

Dalport Oil Corp., 104 IBLA 327 (Sept. 21, 1988)

BUREAU OF RECLAMATION  
(See also Irrigation Claims--if included in this Index.)

## GENERALLY

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary

## BUREAU OF RECLAMATION--Continued

### GENERALLY--Continued

of the Interior is necessary under the Act for leasing of the land.

Robert J. Shorney, 88 IBLA 61 (July 22, 1985)

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 4601-18(c) (1982) cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

### REIMBURSABILITY

A right-of-use may be granted to the Town of Grand Lake, Colorado, by the Bureau of Reclamation without fair market value reimbursement, pursuant to Departmental regulation 43 CFR 429.4, where a reasonable opportunity exists for the exchange of rights-of-use privileges and there exists a reciprocal agreement between the Bureau and the Town for the right-of-use privileges providing for such exchange.

In the Matter of the Appeal of Grand Lake Ass'n, Inc., 8 OHA 1 (Dec. 20, 1988)

## CLAIMS AGAINST THE UNITED STATES

(See also Contracts, Federal Employees & Officers, Irrigation Claims, Torts--if included in this Index.)

### GENERALLY

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

28 U.S.C. § 516 (1982), vests the Department of Justice with authority to control the defense of litigation pending in the United States Claims Court. Bureau of Indian Affairs officials are without authority to override the decisions of Justice Department attorneys concerning conduct of the litigation.

Oglala Sioux Tribe v. Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 16 IBIA 201 (Aug. 18, 1988)

## CLASSIFICATION AND MULTIPLE USE ACT OF 1964

Mining claims located on land which has been segregated from appropriation under the mining laws by publication in the Federal Register of a notice of classification under the Classification and Multiple Use Act of 1964 are properly declared null and void ab initio. A subsequent modification or revocation of the classification order will not retroactively validate locations made while the lands were segregated from mineral entry.

Pluess-Stauffer (California), Inc., 106 IBLA 198 (Dec. 21, 1988)



CLASSIFICATION AND MULTIPLE USE ACT OF 1964--Continued

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

COAL LEASES AND PERMITS  
(See also Mineral Leasing Act--if included in this Index.)

GENERALLY

Where a bidder at a competitive coal lease sale clearly has notice of the deferred bonus payment schedule required of the lessee, it accepts that schedule by submitting a bid. The failure of BLM to include the payment schedule in the lease does not foreclose BLM from amending the lease to include the payment schedule.

Abston Construction Co., Inc., 89 IBLA 202 (Oct. 22, 1985)

Advance royalty provisions in a lease issued in 1975 under the Department's short-term coal leasing criteria were not modified by regulations promulgated in 1976 implementing the Federal Coal Leasing Amendments Act that governed the imposition of advance royalties. Where the lease made explicit provisions for how and when advance royalties were to be paid, and nothing in the regulations indicated an intent to modify the express lease terms, the lease terms were unaffected by promulgation of the regulations.

Cyprus Western Coal Co., 103 IBLA 218 (July 26, 1988)

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

Under 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), 10 years from which they were not producing the coal deposits in commercial quantities, in the absence of extraordinary circumstances concerning the failure to produce coal on this lease, BLM is prohibited from approving an assignment transferring an interest in any existing Federal coal lease to them. Under 43 CFR 3472.1-2(e)(1)(ii), an entity seeking to obtain approval of a transfer must qualify on the date the transfer is disapproved. Where the parties did not qualify for the assignment at the time BLM considered their application for approval of assignment, BLM properly disapproves the application.

The requirement that a coal lease be "diligently developed" on pain of termination is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits "in commercial quantities." It is irrelevant to the application of 43 CFR 3472.1-2(e)(1)(i) when and whether the holders of a lease not producing coal deposits in commercial quantities might also be required to accomplish "diligent development" of that lease.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligation or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement

COAL LEASES AND PERMITS--ContinuedGENERALLY--Continued

of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

BLM properly increases the bond for a coal lease in accordance with appropriate Departmental guidelines where the lease goes from a nonproducing to a producing status, regardless of whether such production constitutes full development of the leased land.

United States Fuel Co., 109 IBLA 398 (June 27, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

If the record contains conflicting BLM calculations of recoverable coal reserves existing on the lease at the time the lease became subject to the due diligence requirement, and BLM has failed to explain its decision to use an earlier, higher estimate of recoverable reserves rather than a subsequent, lower estimate for calculating the production rate necessary to satisfy the continued operation requirement, BLM's calculations will be set aside, and the case will be remanded for further consideration of the recoverable coal reserves estimate.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

A BLM decision holding that a pre-Aug. 4, 1976, Federal coal lease became subject to the diligence requirements of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982) upon lease modification in 1981, will be upheld where the record shows that, upon modification, the lease became a logical mining unit and under 43 CFR 3480.0-5(a)(13)(ii)(A), the diligent development period commenced on that date.

AMCA Coal Leasing, Inc., 112 IBLA 103 (Nov. 29, 1989)

COAL LEASES AND PERMITS--ContinuedAPPLICATIONS

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

When one files a coal lease application citing the leasing on application regulations in 43 CFR Subpart 3425, but in a subsequent submission declares that he will be using the coal for domestic energy needs, a conflict arises because one seeking coal for such a use must acquire a license to mine in accordance with 43 CFR Subpart 3440.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

COAL LEASES AND PERMITS--ContinuedASSIGNMENTS AND TRANSFERS

Where BLM has approved the assignment of a record title interest in an Alaskan coal lease at a time when the lease account is not in good standing, the assignment is not void but voidable at the discretion of BLM. If the assignment has not been voided by BLM, it remains in effect and binds the assignees.

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

Alaska Statebank, The Travelers Indemnity Co., 111 IBLA 300 (Oct. 27, 1989)

CANCELLATION

Bureau of Land Management may not cancel a competitive coal lease by administrative action, but must institute an appropriate judicial proceeding under 30 U.S.C. § 188(a) (1982) where, subsequent to lease issuance, the lessee failed to pay timely an installment of the deferred bonus bid, and the annual rental as required by the lease which failure constituted cause for cancellation.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

DILIGENCE

If a coal lease issued prior to Aug. 4, 1976 is not producing but is in compliance with its lease diligence obligations, the sec. 2(a)(2)(A) leasing prohibition will nonetheless attach to the holder of the nonproducing coal lease.

The sec. 2(a)(2)(A) leasing prohibition does not arise when advance royalties are being paid in lieu of production under sec. 7(b) of the Mineral Leasing Act,

COAL LEASES AND PERMITS--ContinuedDILIGENCE--Continued

30 U.S.C. § 207(b), continued operation obligation, and when production is not occurring because of force majeure.

The sec. 2(a)(2)(A) leasing prohibition does not attach to the holder of a nonproducing coal lease that is included in a producing logical mining unit approved under sec. 2(d) of the Mineral Leasing Act, 30 U.S.C. § 202a.

Sec. 2(a)(2)(A) of the Mineral Leasing Act of 1920, M-36951 (Feb. 12, 1985) 92 I.D. 537

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

The requirement in sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), that a coal lease must be producing coal in commercial quantities by the end of the tenth lease year or else the lease will terminate is part of the "term" of the coal lease that is extended by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

Nothing in the legislative history of the Federal Coal Leasing Amendments Act of 1976 suggests that Congress intended to preclude the extension of the 10-year production period added to sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

The preamble to the 1982 coal lease operations regulations contains no explanation why the Department



COAL LEASES AND PERMITS--ContinuedDILIGENCE--Continued

reached a conclusion concerning the effect of a suspension of operations and production under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, on the 10-year production period in sec. 7(a) of the Act, 30 U.S.C. § 207(a), which is the opposite of the conclusion expressed both in the preamble to the 1979 coal management regulations and in the 1981 proposed coal lease operations regulations. An amendment to 43 CFR 3483.3(b)(1) (1987), to restore the original 1979 interpretation is fully supported by the law.

As the Interior Board of Land Appeals held in Mountain States Resources Corp., 92 IBLA 184, 93 I.D. 239 (1986), market conditions neither form the basis for suspension of a coal lease nor will they prevent a lease from termination under sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), for failure to produce coal in commercial quantities.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

Sec. 5 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation, and BLM properly terminates a lease on which there has been no production during the 10-year diligent development period.

Mountain States Resources Corp., 111 IBLA 160 (Oct. 4, 1989)

A BLM decision holding that a pre-Aug. 4, 1976, Federal coal lease became subject to the diligence requirements of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), upon lease modification in 1981, will be upheld where the record shows that, upon modification, the lease became a logical mining unit and under 43 CFR 3480.0-5(a)(13)(ii)(A), the diligent development period commenced on that date.

AMCA Coal Leasing, Inc., 112 IBLA 103 (Nov. 29, 1989)

COAL LEASES AND PERMITS--ContinuedDILIGENCE--Continued

A determination by the Department of the Interior of recoverable coal reserves within a lease may be adjusted as new information becomes available or to more adequately reflect existing information.

"Not permissible." As used in 43 CFR 3480.0-5(a)(23), the exclusion of other areas where mining is "not permissible" from the minable reserve base does not encompass areas in which no permit has been obtained, absent a showing that no permit can be obtained.

Where the applicable policy directive provides that a 40-percent recovery factor will be applied for multiple seam mining, application of a 50-percent factor will be reversed absent a showing that, under the specific facts of record, the higher recovery rate could be reasonably predicted.

Atlantic Richfield Co., West Elk Co., 112 IBLA 115 (Nov. 30, 1989)

LEASES

There are several lawful ways to define the statutory phrase "producing . . . in commercial quantities," contained in sec. 2(a)(2)(A) of the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A). The Secretary has discretionary authority to administratively define the phrase.

The prohibition against the issuance of new leases created by sec. 2(a)(2)(A) of the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A), extends to all mineral leases issued under the Mineral Leasing Act, not merely to coal leases.

If a coal lease issued prior to Aug. 4, 1976 is not producing but is in compliance with its lease diligence obligations, the sec. 2(a)(2)(A) leasing prohibition will nonetheless attach to the holder of the nonproducing coal lease.

The sec. 2(a)(2)(A) leasing prohibition does not arise when advance royalties are being paid in lieu of

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

production under sec. 7(b) of the Mineral Leasing Act, 30 U.S.C. § 207(b), continued operation obligation, and when production is not occurring because of force majeure.

Production during the 10-year holding period does not toll the running of the 10-year holding period of sec. 2(a)(2)(A).

The sec. 2(a)(2)(A) leasing prohibition does not attach to the holder of a coal lease that is not producing because production has been suspended under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

The sec. 2(a)(2)(A) leasing prohibition does not attach to the holder of a nonproducing coal lease that is included in a producing logical mining unit approved under sec. 2(d) of the Mineral Leasing Act, 30 U.S.C. § 202a.

Upon approval of a coal lease assignment, a new 10-year holding period starts for the assignee, and the assignor of the nonproducing coal lease is no longer penalized by the lease's nonproducing status.

Sec. 2(a)(2)(A) does not prohibit an entity which is disqualified from lease issuance from acquiring a lease by assignment.

Under sec. 30 of the Mineral Leasing Act, 30 U.S.C. § 187, the Secretary has discretionary authority to prohibit coal lease assignments holding nonproducing leases for 10 years more.

The Secretary lacks authority to disapprove a relinquishment of a nonproducing coal lease for the sole reason the lessee has not produced coal in 10 years or more.

The sec. 2(a)(2)(A) leasing prohibition runs to all entities "controlled by or under common control" with the holder of a nonproducing lease.

Sec. 2(a)(2)(A) of the Mineral Leasing Act of 1920, M-36951 (Feb. 12, 1985) 92 I.D. 537

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

Where a coal lessee is notified of the terms and conditions of the coal lease upon modification and is informed of the effective date assigned to the lease, such lessee must timely object or thereafter be barred from arguing the propriety of the modified lease's terms and conditions.

AMCA Coal Leasing, Inc., 86 IBLA 21 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), in accordance with the requirements of the statute and its implementing regulations,

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

where a notice of intent to readjust is transmitted prior to the end of the 20-year period that follows lease issuance.

When the Department of the Interior readjusts a lease that was issued prior to the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), it must do so in conformity with the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land.

Ark Land Co., 86 IBLA 153 (Apr. 25, 1985)

The Bureau of Land Management may properly conform a competitive coal lease to set forth the specific deferred bonus bid and schedule for payment in accordance with the terms of the lease sale. By submitting its bid, the lessee has already agreed to such a deferred bonus bid payment where the term was included in the detailed statement of the lease sale and was incorporated into the contract upon acceptance of the bid and subsequent lease issuance.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

In order to be eligible for addition to a coal lease by modification under 30 U.S.C. § 203 (1982), coal lands or coal deposits must be contiguous to or corner on those contained in the base lease. A decision rejecting an application for modification will be affirmed where the coal deposit is not contiguous, i.e., does not have at least one point in common with the coal deposit in the base lease.

Gulf Oil Corp., Republic Steel Corp., 87 IBLA 109 (May 31, 1985)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

A Federal coal lease which is subject to readjustment subsequent to enactment of the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), will be conformed upon readjustment to the terms required by that statute.

Regulation 43 CFR 3451.1(c)(1) specifically provides that a notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of the initial 20-year period for leases issued prior to Aug. 4, 1976. Where BLM fails to provide such notice to a lessee holding a 50-percent undivided interest in a lease and the record indicates the lessee did not have actual knowledge of BLM's



COAL LEASES AND PERMITS--ContinuedLEASES--Continued

intent to readjust on or before the anniversary date of the lease, the lease may not be readjusted.

Consolidation Coal Co., Gulf Oil Corp., 87 IBLA 296 (June 25, 1985)

Where a bidder at a competitive coal lease sale clearly has notice of the deferred bonus payment schedule required of the lessee, it accepts that schedule by submitting a bid. The failure of BLM to include the payment schedule in the lease does not foreclose BLM from amending the lease to include the payment schedule.

Abston Construction Co., Inc., 89 IBLA 202 (Oct. 22, 1985)

Notice of intent to readjust coal leases given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

Coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 become, at readjustment, subject to the requirements of that Act and regulations promulgated pursuant to that Act.

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the public lands.

Ark Land Co., 90 IBLA 43 (Dec. 10, 1985)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit," as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

given prior to the end of the 20-year primary term of the lease.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation for any mine.

Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 15, 1986)

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other new terms and conditions on the lease until the end of the next 10-year readjustment period.

Franklin Real Estate Co., 93 IBLA 272 (Aug. 29, 1986)

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 201(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)  
93 I.D. 394

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982), if needed.

Spring Creek Coal Co., 94 IBLA 333 (Nov. 25, 1986)  
Pacificorp., 95 IBLA 16 (Dec. 12, 1986)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

Ark Land Co. (On Reconsideration), 96 IBLA 140 (Mar. 11, 1987)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co., et al., 94 IBLA 352 (Dec. 1, 1986)

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

Where stipulations included in a readjusted coal lease do not recognize the extent to which a lessee has already conducted activities on the leased lands, those stipulations must be amended to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance does not constitute a violation.

Kerr-McGee Coal Corp., 96 IBLA 280 (Mar. 26, 1987)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions challenged by the lessee are mandated by statute or regulation or



COAL LEASES AND PERMITS--ContinuedLEASES--Continued

where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982) for readjusted lease terms will provide that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine. Pursuant to 43 CFR 3473.3-2(a)(3), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. In the absence of either ongoing underground mining operations or a pending resource recovery and protection plan which contemplates underground operations, a lessee cannot establish that conditions warrant the imposition of less than an 8-percent royalty as a readjusted term.

The decisions of the Board of Land Appeals are final for the Department upon issuance. Thus, absent affirmative action by a Federal Court, a decision of a State Office directing an increase in bonding levels based on increased rental and royalty rates under readjusted lease terms which have been approved by the Board will be affirmed, even though the decision readjusting the rental and royalty rates is the subject of a suit for judicial review.

Ark Land Co., 97 IBLA 241 (May 13, 1987)

Notice of intent to readjust a coal lease given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

If, based on information obtainable from the results of operations or from information available in a resource recovery and reclamation plan, it can be established that conditions warrant doing so, the authorized officer may set a royalty rate for an underground mine at less than 8 percent but not less than 5 percent.

Western Fuels-Utah, Inc., 98 IBLA 114 (June 16, 1987)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

Where the Forest Service issues a decision determining that certain stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

In accordance with 43 CFR 3473.3-2(a)(3), the BLM authorized officer may, if conditions warrant, set a royalty rate of less than 8 percent, but not less than 5 percent, for coal removed from an underground mine. However, where BLM has established an 8-percent royalty rate, and, on appeal, the lessee argues that conditions warrant a lesser rate, the Board need not remand for a determination by BLM, but will affirm, where the record shows the lease is nonproducing and no production is expected in the near future.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

Advance royalty provisions in a lease issued in 1975 under the Department's short-term coal leasing criteria were not modified by regulations promulgated in 1976 implementing the Federal Coal Leasing Amendments Act that governed the imposition of advance royalties. Where the lease made explicit provisions for how and when advance royalties were to be paid, and nothing in the regulations indicated an intent to modify the express lease terms, the lease terms were unaffected by promulgation of the regulations.

Cyprus Western Coal Co., 103 IBLA 218 (July 26, 1988)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, codified at 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment period.

BLM may incorporate language in a readjusted coal lease which makes termination of liability under the lease bond contingent on reclamation of all lands the surface of which has been disturbed, including land within a permit area, where Departmental regulations allow BLM, on its own or at the lessee's instigation, to release liability under the bond to the extent it covers reclamation obligations within a permit area.

General Electric Holdings, Inc., Trapper Mining, Inc.,  
103 IBLA 366 (Aug. 12, 1988)

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to the Act.

When a coal lessee conducting underground coal operations objects to a provision in a readjusted coal lease establishing a royalty of 8 percent for coal removed by underground methods and argues that conditions warrant the imposition of a royalty rate of 5 percent, the case will be remanded to BLM to allow the lessee the opportunity to establish that conditions warrant a royalty rate of less than 8 percent.

A BLM decision to increase the amount of bonding required for a coal lessee will be affirmed when the increase is consistent with regulatory purposes.

Utah Power & Light Co., 104 IBLA 284 (Sept. 14, 1988)

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

BLM properly denies a request for approval of an assignment of the record title interest in a coal lease where the lease account is not in good standing with respect to the payment of annual rental and production royalty, and the assignee has not presented evidence sufficient to rebut that conclusion.

Storm King Coal Mining Co., 105 IBLA 126 (Oct. 26, 1988)

The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year readjustment period.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. § 201(a)(2)(A) (1982), insofar as

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

the lessee seeks to qualify to hold other Federal leases.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)  
96 I.D. 77

Any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Under sec. 203 of the Mineral Leasing Act, modification of a coal lease by including additional coal lands may be approved by the Secretary upon a finding that it would be "in the interest of the United

COAL LEASES AND PERMITS--ContinuedLEASES--Continued

States." A decision rejecting an application for modification of a coal lease will be affirmed on appeal where it appears that approval of the application is not in the public interest.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

Alaska Statebank, The Travelers Indemnity Co., 111 IBLA 300 (Oct. 27, 1989)

A determination by the Department of the Interior of recoverable coal reserves within a lease may be adjusted as new information becomes available or to more adequately reflect existing information.

"Not permissible." As used in 43 CFR 3480.0-5(a)(23), the exclusion of other areas where mining is "not permissible" from the minable reserve base does not encompass areas in which no permit has been obtained, absent a showing that no permit can be obtained.

Where the applicable policy directive provides that a 40-percent recovery factor will be applied for multiple seam mining, application of a 50-percent factor will be reversed absent a showing that, under the specific facts of record, the higher recovery rate could be reasonably predicted.

Atlantic Richfield Co., West Elk Co., 112 IBLA 115  
(Nov. 30, 1989)



COAL LEASES AND PERMITS--ContinuedPERMITSGenerally

BLM properly rejects an application for a royalty-free license to mine coal under sec. 8 of the Mineral Leasing Act, 30 U.S.C. § 208 (1982), when the stated use of the coal is to generate electricity for mining purposes.

Randall & Janet Gerlach, 112 IBLA 193 (Dec. 13, 1989)

READJUSTMENT

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

BLM is not barred from readjusting the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is transmitted prior to the end of the 20-year period that follows lease issuance.

When the Department of the Interior readjusts a lease that was issued prior to the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201 (1982), it must do so in conformity with the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the land.

Ark Land Co., 86 IBLA 153 (Apr. 25, 1985)

A Federal coal lease which is subject to readjustment subsequent to enactment of the Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), will be conformed upon readjustment to the terms required by that statute.

Regulation 43 CFR 3451.1(c)(1) specifically provides that a notice of readjustment or notice of intent to readjust must be given to the lessee at or before the expiration of the initial 20-year period for leases issued prior to Aug. 4, 1976. Where BLM fails to provide such notice to a lessee holding a 50-percent undivided interest in a lease and the record indicates the lessee did not have actual knowledge of BLM's intent to readjust on or before the anniversary date of the lease, the lease may not be readjusted.

Consolidation Coal Co., Gulf Oil Corp., 87 IBLA 296 (June 25, 1985)

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

Notice of intent to readjust coal leases given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

Coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 become, at readjustment, subject to the requirements of that Act and regulations promulgated pursuant to that Act.

A BLM decision to readjust the terms and conditions of a coal lease to include additional requirements will be affirmed where the requirements are mandated by statute or regulation, or are in accordance with proper administration of the public lands.

Ark Land Co., 90 IBLA 43 (Dec. 10, 1985)

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit," as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation for any mine.

Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 15, 1986)

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other new terms and conditions on the lease until the end of the next 10-year readjustment period.

Franklin Real Estate Co., 93 IBLA 272 (Aug. 29, 1986)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co. et al., 94 IBLA 352 (Dec. 1, 1986)

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982), if needed.

Ark Land Co. (On Reconsideration), 96 IBLA 140 (Mar. 11, 1987)

BLM is not barred from readjusting all the terms and conditions of a coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 201-209 (1982), in accordance with the requirements of the statute and its implementing regulations, where a notice of intent to readjust is given prior to the end of the 20-year primary term of the lease.

Where stipulations included in a readjusted coal lease do not recognize the extent to which a lessee has already conducted activities on the leased lands, those stipulations must be amended to clarify the extent to which appellant's existing operations are affected and to ensure that mere acceptance does not constitute a violation.

Kerr-McGee Coal Corp., 96 IBLA 280 (Mar. 26, 1987)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may,



COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions challenged by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982) readjusted lease terms will provide that royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine. Pursuant to 43 CFR 3473.3-2(a)(3), royalty for coal removed by underground methods will be 8 percent unless the lessee establishes that conditions warrant a lower amount, but in no case shall the lease term provide for less than 5-percent royalty for coal removed by underground operations. In the absence of either ongoing underground mining operations or a pending resource recovery and protection plan which contemplates underground operations, a lessee cannot establish that conditions warrant the imposition of less than an 8-percent royalty as a readjusted term.

The decisions of the Board of Land Appeals are final for the Department upon issuance. Thus, absent affirmative action by a Federal Court, a decision of a State Office directing an increase in bonding levels based on increased rental and royalty rates under readjusted lease terms which have been approved by the Board will be affirmed, even though the decision readjusting the rental and royalty rates is the subject of a suit for judicial review.

Ark Land Co., 97 IBLA 241 (May 13, 1987)

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

Notice of intent to readjust a coal lease given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

If, based on information obtainable from the results of operations or from information available in a resource recovery and reclamation plan, it can be established that conditions warrant doing so, the authorized officer may set a royalty rate for an underground mine at less than 8 percent but not less than 5 percent.

Western Fuels-Utah, Inc., 98 IBLA 114 (June 16, 1987)

Readjustment of a coal lease is not timely where, prior to the end of the second 20-year period of the lease in 1974, BLM gave the lessee notice of BLM's intention to readjust the lease, but thereafter ensued a 5-year delay in furnishing appellant the proposed lease terms and an additional 6-year delay in responding to appellant's objections to the proposed lease terms.

Atlantic Richfield Co., 99 IBLA 179 (Oct. 9, 1987)

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

Where the Forest Service issues a decision determining that certain special stipulations should be included in a readjusted coal lease on National Forest lands and provides the right to appeal that decision through the Forest Service appeals procedures in 36 CFR 211.18, that review procedure must be utilized to challenge directly the special stipulations.

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

In accordance with 43 CFR 3473.3-2(a)(3), the BLM authorized officer may, if conditions warrant, set a royalty rate of less than 8 percent, but not less than 5 percent, for coal removed from an underground mine. However, where BLM has established an 8-percent royalty rate, and, on appeal, the lessee argues that conditions warrant a lesser rate, the Board need not remand for a determination by BLM, but will affirm, where the record shows the lease is nonproducing and no production is expected in the near future.

Coastal States Energy Co., 99 IBLA 342 (Nov. 3, 1987)

In accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), it is error for BLM, in readjusting a coal lease for an active underground coal mine, to set a royalty rate of 8 percent for coal removed from such mine without first determining if conditions warrant a lower rate.

Kaiser Coal Corp., 103 IBLA 312 (Aug. 5, 1988)

Coastal States Energy Co., 105 IBLA 64 (Oct. 18, 1988)

For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, codified at 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment period.

BLM may incorporate language in a readjusted coal lease which makes termination of liability under the lease bond contingent on reclamation of all lands the surface of which has been disturbed, including land within a permit area, where Departmental regulations allow BLM, on its own or at the lessee's instigation, to release liability under the bond to the extent it covers reclamation obligations within a permit area.

General Electric Holdings, Inc., Trapper Mining, Inc., 103 IBLA 366 (Aug. 12, 1988)

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a lease may be readjusted at the end of the next 10-year readjustment period.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

Any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision

COAL LEASES AND PERMITS--ContinuedREADJUSTMENT--Continued

effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

Where operations and production under a coal lease issued prior to Aug. 4, 1976, are suspended during the initial 20-year period of the lease, pursuant to sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), the running of the 20-year period is suspended during the period of the suspension.

Consolidation Coal Co., 111 IBLA 381 (Nov. 8, 1989)

RENTALS

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development, and be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986)  
93 I.D. 239

COAL LEASES AND PERMITS--ContinuedRENTALS--Continued

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

Alaska Statebank, The Travelers Indemnity Co., 111 IBLA 300 (Oct. 27, 1989)

ROYALTIES

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a



COAL LEASES AND PERMITS--ContinuedROYALTIES--Continued

lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 201(a)(1) (1982), and, hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)

93 I.D. 394

COAL LEASES AND PERMITS--ContinuedROYALTIES--Continued

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

Where the language of a negotiated coal lease provides that the value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs incurred between the point of delivery from the pit and the point of sale, and it is clear from the record that all transportation costs from the pit to the processing plant were intended to be deductible, the point of delivery from the pit is properly held to be the point when the haul trucks have been loaded in the pit.

Royalties, production and severance taxes, black lung taxes, and reclamation fees are properly considered to be elements of the costs of mining and, as such, no part of these expenses will be allowed to be deducted from value for royalty computation purposes as an indirect cost of transportation or processing.

Black Butte Coal Co., 103 IBLA 145 (July 21, 1988) 95 I.D. 89

30 CFR 218.200 (1985) authorizes the Minerals Management Service to impose a late payment interest charge where royalty payments for coal leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the Government for loss of use of funds due but not paid.

Cyprus Western Coal Co., 103 IBLA 278 (Aug. 3, 1988)

COAL LEASES AND PERMITS--ContinuedROYALTIES--Continued

In accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), it is error for BLM, in readjusting a coal lease for an active underground coal mine, to set a royalty rate of 8 percent for coal removed from such mine without first determining if conditions warrant a lower rate.

Kaiser Coal Corp., 103 IBLA 312 (Aug. 5, 1988)

Coastal States Energy Co., 105 IBLA 64 (Oct. 18, 1988)

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

COAL LEASES AND PERMITS--ContinuedROYALTIES--Continued

The computation of an allowance for transportation and processing costs under the terms of a coal lease permitting the deduction of those costs from the value of the coal may be upheld as reasonable where it is based on the sum of the annual operating and maintenance expenses, the annual depreciation of transportation and processing equipment, and a return on undepreciated investment based on the prime interest rate.

Black Butte Coal Co., 111 IBLA 275 (Oct. 26, 1989)

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

Alaska Statebank, The Travelers Indemnity Co., 111 IBLA 300 (Oct. 27, 1989)

SUSPENSION OF OPERATIONS AND PRODUCTION

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986)  
93 I.D. 239

When the Secretary directs or consents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, the lessee is denied all beneficial use of the lease, including production. "Beneficial use" refers to all operations under the lease except for those



COAL LEASES AND PERMITS--ContinuedSUSPENSION OF OPERATIONS AND PRODUCTION--Continued

necessary to maintain or preserve the well or mine workings, to conduct reclamation work or to protect the leased lands, natural resources, or public health and safety.

Congress provided two forms of relief when the Secretary directs or assents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209 - extension of the "term" by the period of suspension and elimination of annual rent during the suspension.

"Term." The term of a lease issued pursuant to the Mineral Leasing Act, when used without limitation as in sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, includes all periods of time between the effective date and the expiration date and means the entire estate demised by the lease.

A suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, is clearly a relief provision and must be liberally construed. By extending the term of the lease by the period of the suspension, Congress intended that the lessee should have exactly the same contract with exactly the same term but with a later maturity date.

The requirement in sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), that a coal lease must be producing coal in commercial quantities by the end of the tenth lease year or else the lease will terminate is part of the "term" of the coal lease that is extended by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

Nothing in the legislative history of the Federal Coal Leasing Amendments Act of 1976 suggests that Congress intended to preclude the extension of the 10-year production period added to sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

The preamble to the 1982 coal lease operations regulations contains no explanation why the Department reached a conclusion concerning the effect of a suspension of operations and production under sec. 39 of

COAL LEASES AND PERMITS--ContinuedSUSPENSION OF OPERATIONS AND PRODUCTION--Continued

the Mineral Leasing Act, 30 U.S.C. § 209, on the 10-year production period in sec. 7(a) of the Act, 30 U.S.C. § 207(a), which is the opposite of the conclusion expressed both in the preamble to the 1979 coal management regulations and in the 1981 proposed coal lease operations regulations. An amendment to 43 CFR 3483.3(b)(1) (1987), to restore the original 1979 interpretation is fully supported by the law.

As the Interior Board of Land Appeals held in Mountain States Resources Corp., 92 IBLA 184, 93 I.D. 239 (1986), market conditions neither form the basis for suspension of a coal lease nor will they prevent a lease from termination under sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), for failure to produce coal in commercial quantities.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988)  
96 I.D. 15

Where operations and production under a coal lease issued prior to Aug. 4, 1976, are suspended during the initial 20-year period of the lease, pursuant to sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), the running of the 20-year period is suspended during the period of the suspension.

Consolidation Coal Co., 111 IBLA 381 (Nov. 8, 1989)

TERMINATION

Sec. 5 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation, and BLM properly terminates a lease on which there has been no production during the 10-year diligent development period.

Mountain States Resources Corp., 111 IBLA 160 (Oct. 4, 1989)



COLOR OR CLAIM OF TITLEGENERALLY

The obligation for proving a valid color-of-title claim is upon the applicant. A failure to carry the burden of proof with respect to any one of the elements for a color-of-title claim is fatal to the application.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

Applicants for a patent under 43 U.S.C. § 1221 (1982) have the burden of proving each of the requirements for patent to the satisfaction of the Secretary of the Interior.

Finley F. Martin, John C. Martin, 86 IBLA 254 (May 3, 1985)

The burden of establishing a valid color-of-title claim is on the claimant.

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal

COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

One who files a Class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith, and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units. The statute does not give BLM the authority to grant a Class 2 application where the first document upon which the claim or color of title is based is dated after Jan. 1, 1901.

Weyerhaeuser Co., 89 IBLA 279 (Nov. 8, 1985)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

The Department of the Interior cannot grant a color-of-title application for land that was patented and is no longer public land.

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document

COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James E. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

Under 43 U.S.C. § 1068(b) (1982), one who files a class 2 color-of-title application is required to establish, *inter alia*, that the tract applied for has been held in good faith and in peaceful, adverse possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application, during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application where these requirements are not met.

Agee S. Broughton, Jr. (Trustee), 95 IBLA 343 (Feb. 4, 1987)

BLM properly rejects a class 2 color-of-title application if the applicant fails to submit evidence showing payment of taxes levied on the land for the period commencing not later than Jan. 1, 1901, to the date of application.

Where in a decision rejecting a class 2 color-of-title application BLM observes that the applicant also failed to meet the class 1 requirements because valuable improvements were not placed on the land nor were the lands reduced to cultivation, but the record indicates appellant engaged in forestry practices on such land, the decision will be vacated in part and

COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

the case remanded to allow the applicant to submit a class 1 application detailing those practices in support of the position that valuable improvements were placed on the land.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramsen, Rosemary Ludvick v. Heirs & devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

The Department cannot grant a color-of-title application for land that was patented and is no longer public land.

One who files a class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, *inter alia*, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state and local governmental units. The statute does not give BLM the authority to grant a class 2 application where there is no evidence the lands applied for were included in lands conveyed to the applicants.

Wilbur C. Nemitz et al., 97 IBLA 121 (Apr. 30, 1987)

COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, of his 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), must be remanded to BLM where the applicants claim to have fully complied with the 1954 Act, but where their application was rejected for failure to comply with provisions of another statute, the Act of Dec. 22, 1928, the Color of Title Act, 43 U.S.C. § 1068 (1982).

Victor A. Markunas, Victoria E. Markunas, 101 IBLA 187 (Feb. 17, 1988)

COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which, on its face, purports to convey the claimed land to the applicant or the applicant's predecessors.

Loyla C. Waskul, 102 IBLA 241 (May 19, 1988)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

A class 2 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application when these requirements are not met.

Alvin E. & Mary R. Leukumá, 103 IBLA 302 (Aug. 4, 1988)

A class I color-of-title claim must be based upon a document which, on its face, purports to convey the claimed land to claimant or his predecessor. Where the only evidence of conveyance is a bill of sale conveying a cabin located on the claimed land, a color-of-title application is properly rejected.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)



COLOR OR CLAIM OF TITLE--ContinuedGENERALLY--Continued

Equitable title to land claimed under a class 1 color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests only upon the filing of the application by a qualified applicant. A patent for such land cannot be issued if outstanding, unpatented mining claims existed on the subject land prior to the filing of the color-of-title application in the absence of either a relinquishment of the mining claims or a mining contest resulting in a finding that the mining claims are null and void.

Coleen Garland et al., 111 IBLA 364 (Nov. 3, 1989)

ADVERSE POSSESSION

Good faith and peaceful adverse possession for more than 20 years pursuant to a claim of title is required to establish a class 1 color-of-title claim under 43 U.S.C. § 1068 (1982). There can be no peaceful, adverse possession where applicant's chain of title commences at a time when the land was withdrawn and such a claim is properly rejected.

Arizona Real Estate Exchange, Inc., 94 IBLA 1 (Sept. 18, 1986)

An applicant for a class 1 color-of-title claim must show peaceful adverse possession of the claimed lands for a period of at least 20 years. Mere occupancy of public lands and the making of improvements thereon give rise to no vested rights against the United States, absent some colorable claim of right of possession.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

APPLICATIONS

BLM may properly reject a class 1 color-of-title application filed pursuant to the Color of Title Act,

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant claims chain of title originating with a certificate of tax sale to the county, executed prior to the withdrawal for Federal purposes. A certificate of tax sale does not constitute a conveyance and does not establish color of title because the right of redemption had not expired and there can be no adverse possession.

Richard F. Christensen, 85 IBLA 108 (Feb. 14, 1985)

The obligation for proving a valid color-of-title claim is upon the applicant. A failure to carry the burden of proof with respect to any one of the elements for a color-of-title claim is fatal to the application.

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith, for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in effect because there can be no adverse possession in such case.

To establish a class 1 color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at

# COLOR OR CLAIM OF TITLE--Continued

## APPLICATIONS--Continued

the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), is properly rejected where the applicant fails to establish that the land lies between the meander line of an inland lake or river in Wisconsin as originally surveyed and the meander line of that lake or river as subsequently resurveyed.

Applicants for a patent under 43 U.S.C. § 1221 (1982) have the burden of proving each of the requirements for patent to the satisfaction of the Secretary of the Interior.

Finley F. Martin, John C. Martin, 86 IBLA 254 (May 3, 1985)

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

# COLOR OR CLAIM OF TITLE--Continued

## APPLICATIONS--Continued

One who files a Class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units. The statute does not give BLM the authority to grant a Class 2 application where the first document upon which the claim or color of title is based is dated after Jan. 1, 1901.

Meyerhaeuser Co., 89 IBLA 279 (Nov. 8, 1985)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Fattig, 90 IBLA 323 (Feb. 25, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

Good faith and peaceful adverse possession for more than 20 years pursuant to a claim of title is required to establish a class 1 color-of-title claim under 43 U.S.C. § 1068 (1982). There can be no peaceful, adverse possession where applicant's chain of title commences at a time when the land was withdrawn and such a claim is properly rejected.

Arizona Real Estate Exchange, Inc., 94 IBLA 1 (Sept. 18, 1986)

A Class 1 color-of-title claim requires peaceful adverse possession in good faith by claimant or predecessors in interest under claim or color of title for the prescribed period of time. The claim or color of title must be based upon a document from a party other than the U.S. Government which on its face purports to convey the claimed land to the applicant or the applicant's predecessors.

Ramona & Boyd Lawson, 94 IBLA 220 (Nov. 10, 1986)

The Department of the Interior cannot grant a color-of-title application for land that was patented and is no longer public land.

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James E. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

Under 43 U.S.C. § 1068(b) (1982), one who files a class 2 color-of-title application is required to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application, during which time they have paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application where these requirements are not met.

Agee S. Broughton, Jr. (Trustee), 95 IBLA 343 (Feb. 4, 1987)

BLM properly rejects a class 2 color-of-title application if the applicant fails to submit evidence showing payment of taxes levied on the land for the period commencing not later than Jan. 1, 1901, to the date of application.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

The Department cannot grant a color-of-title application for land that was patented and is no longer public land.

One who files a class 2 color-of-title application is required by 43 U.S.C. § 1068(b) (1982) to establish, inter alia, that the tract applied for has been held in good faith and in peaceful, adverse, possession by the claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have paid taxes levied on the land by state



COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

and local governmental units. The statute does not give BLM the authority to grant a class 2 application where there is no evidence the lands applied for were included in lands conveyed to the applicants.

Wilbur C. Nemitz et al., 97 IBLA 121 (Apr. 30, 1987)

When a patent to the land incorporates by reference a description of the land as being bounded by a river and the land described in the color-of-title application is for the land accreted to the applicant's property, the applicant as the riparian owner has title to the accreted lands. Neither a color-of-title application nor a sale of the lands to the applicant by BLM would be proper.

Where BLM has rejected a color-of-title application for land described as being bounded on the north by a river and there is evidence showing that the applicant may in fact have color of title to the land if it avulsed to her property, the decision will be set aside and remanded to BLM for consideration of whether title to the land is in the United States.

Holly H. Baca, Estate of Anthony K. Baca, 97 IBLA 126 (Apr. 30, 1987)

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

An application for a patent under the Act of Aug. 24, 1954, commonly known as the O'Konski Act, 43 U.S.C. § 1221 (1982), must be remanded to BLM where the applicants claim to have fully complied with the 1954 Act, but where their application was rejected for failure to comply with provisions of another statute, the Act of Dec. 22, 1928, the Color of Title Act, 43 U.S.C. § 1068 (1982).

Victor A. Markunas, Victoria E. Markunas, 101 IBLA 187 (Feb. 17, 1988)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which, on its face, purports to convey the claimed land to the applicant or the applicant's predecessors.

Lovla C. Waskul, 102 IBLA 241 (May 19, 1988)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. When the applicant fails to produce such a document, the application must be rejected.

A class 2 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for a period commencing not later than Jan. 1, 1901, to the date of application during which time they have

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

paid taxes levied on the land by state and local governmental units. BLM properly rejects a class 2 application when these requirements are not met.

Good faith, as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that a claimant and his predecessors in interest reasonably believe that no defect exists in the title to the land claimed. The Department may consider whether a claimant's belief was unreasonable in light of the facts actually known or available to the claimant or a predecessor.

Alvin E. & Mary R. Leukuma, 103 IBLA 302 (Aug. 4, 1988)

A class I color-of-title claim must be based upon a document which, on its face, purports to convey the claimed land to claimant or his predecessor. Where the only evidence of conveyance is a bill of sale conveying a cabin located on the claimed land, a color-of-title application is properly rejected.

An applicant for a color-of-title claim must show good faith possession of the land. Where the applicant has previously sought to lease part of the land from the United States, that action constitutes acknowledgment of Federal ownership which negates good faith.

An applicant for a class I color-of-title claim must show peaceful adverse possession of the claimed lands for a period of at least 20 years. Mere occupancy of public lands and the making of improvements thereon give rise to no vested rights against the United States, absent some colorable claim of right of possession.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

A class I color-of-title requires peaceful adverse possession in good faith by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim of color of title must be based upon a document from a party other than the U.S. Government which on its face purports to convey the

COLOR OR CLAIM OF TITLE--ContinuedAPPLICATIONS--Continued

claimed land to the applicant or the applicant's predecessor.

James G. Stockton, 111 IBLA 344 (Nov. 2, 1989)

Equitable title to land claimed under a class 1 color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests only upon the filing of the application by a qualified applicant. A patent for such land cannot be issued if outstanding, unpatented mining claims existed on the subject land prior to the filing of the color-of-title application in the absence of either a relinquishment of the mining claims or a mining contest resulting in a finding that the mining claims are null and void.

Coleen Garland et al., 111 IBLA 364 (Nov. 3, 1989)

A decision rejecting a class 1 color-of-title application will be affirmed where the applicant fails to submit information regarding conveyances of title to the land to the applicant and her predecessors-in-interest and where it is clear, based on information submitted by the applicant on appeal, that there are no documents purporting to grant her title to the land, and that her predecessor-in-interest did not hold the property in good faith.

Rebecca S. Knott-Gray, 112 IBLA 148 (Dec. 7, 1989)

APPRAISED VALUE

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

The Board will not overturn a BLM appraisal of the fair market value of a parcel of land in a conveyance

## COLOR OR CLAIM OF TITLE--Continued

### APPRAISED VALUE--Continued

to a color-of-title applicant where BLM considered the amount of land fit for agricultural use (the highest and best use) in comparing sales of comparable parcels and did not consider the unsubstantiated impact on fair market value of future erosion of the parcel. Fair market value is not controlled by acreage alone, but depends upon difference in use, character, and productivity.

A color-of-title applicant is properly accorded an equitable deduction from the appraised fair market value of the claimed parcel of land based on the longevity of the applicant's colorable title figured from the date of acquisition by the applicant to the date good faith possession ceased, as well as an equitable deduction based on the length of the applicant's chain of title.

A color-of-title applicant is not entitled to an equitable deduction from the appraised fair market value of the claimed parcel of land based on the increased costs of financing the original purchase due to discovery of a defect in title or any supposed further doubt as to Federal title.

Weathersby Godbold Carter, Richard T. Harriss, III,  
97 IBLA 108 (Apr. 29, 1987)

Although equitable title to land claimed under a class I color-of-title application filed pursuant to 43 U.S.C. § 1068 (1982), vests upon compliance with the statutory requirements coupled with the filing of an application with BLM, this does not establish a right in the applicant to the proceeds accruing from oil and gas development subsequent to the application and prior to issuance of patent.

Albert M. Lipscomb, 99 IBLA 217 (Oct. 15, 1987)

### CULTIVATION

BLM may properly reject a class I color-of-title application filed pursuant to the Color of Title Act,

## COLOR OR CLAIM OF TITLE--Continued

### CULTIVATION--Continued

as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

To establish a class I color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

### DESCRIPTION OF LAND

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Fattig, 90 IBLA 323 (Feb. 25, 1986)

A class I color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James E. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)



COLOR OR CLAIM OF TITLE--ContinuedDESCRIPTION OF LAND--Continued

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which, on its face, purports to convey the claimed land to the applicant or the applicant's predecessors.

Loyla C. Waskul, 102 IBLA 241 (May 19, 1988)

GOOD FAITH

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in effect because there can be no adverse possession in such case.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

An applicant who believes or has reason to believe that title to land is in the United States at the time when he acquires it does not hold color of title in good faith.

Good faith under the Color of Title Act requires that the claimants and their predecessors in interest honestly believe themselves seized of the title, and the Department may consider whether such a belief was unreasonable in light of the facts actually known or available to the claimants or a predecessor. However, undocumented hearsay evidence, indicating a lack of good faith because some people in the community are aware of the title being in the Federal Government, will not overcome substantial and documented evidence

COLOR OR CLAIM OF TITLE--ContinuedGOOD FAITH--Continued

that the applicant acted in the good faith belief that he was seized of title.

William T. Bertagnole, 87 IBLA 34 (May 23, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

An applicant for land under the Color of Title Act, 43 U.S.C. § 1068 (1982), must hold the land in good faith for 20 years, in order to obtain a patent. If an applicant admits that, during the time he claimed the land, he knew the United States owned the land, he does not have "good faith" under that Act and his application is properly rejected.

Walter Grant Kreuter, 95 IBLA 291 (Jan. 29, 1987)

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

Patti L. Keith, 100 IBLA 89 (Nov. 30, 1987)

Good faith, as that term is used in the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that a claimant and his predecessors in interest reasonably believe that no defect exists in the title to the land claimed. The Department may consider whether a claimant's belief was unreasonable in light of the

COLOR OR CLAIM OF TITLE--ContinuedGOOD FAITH--Continued

facts actually known or available to the claimant or a predecessor.

Alvin E. & Mary R. Leukuma, 103 IBLA 302 (Aug. 4, 1988)

An applicant for a color-of-title claim must show good faith possession of the land. Where the applicant has previously sought to lease part of the land from the United States, that action constitutes acknowledgment of Federal ownership which negates good faith.

Louis Mark Mannatt, 109 IBLA 100 (June 5, 1989)

IMPROVEMENTS

BLM may properly reject a class 1 color-of-title application filed pursuant to the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the applicant fails to establish that, at the time his application was filed, the land either contained valuable improvements or had been reduced to cultivation.

Jerry G. Perry, 85 IBLA 93 (Feb. 14, 1985)

To establish a class 1 color-of-title application filed under the Color of Title Act, 43 U.S.C. § 1068 (1982), claimed improvements must enhance the value of the land or the land must be reduced to cultivation at the time defective title became known and the application was filed.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

Where in a decision rejecting a class 2 color-of-title application BLM observes that the applicant also failed to meet the class 1 requirements because valuable improvements were not placed on the land nor were the lands reduced to cultivation, but the record indicates appellant engaged in forestry practices on such land, the decision will be vacated in part and the case remanded to allow the applicant to submit a

COLOR OR CLAIM OF TITLE--ContinuedIMPROVEMENTS--Continued

class 1 application detailing those practices in support of the position that valuable improvements were placed on the land.

Soterra, Inc., 95 IBLA 352 (Feb. 11, 1987)

PRIVITY

An application for a class 1 color-of-title claim made pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982), requires that the land be adversely held in good faith, for at least 20 years by the claimant or its predecessors-in-title. Acquiring title to Federal lands by tax deed initiates a new title for the purpose of determining when possession under color of title commenced. A certificate of tax sale for a period preceding execution of the tax deed does not establish a color-of-title right transferable to the grantee of the tax deed where a right of redemption continued in effect because there can be no adverse possession in such case.

Middle Rio Grande Conservancy District, 86 IBLA 41 (Apr. 9, 1985)

The burden of proving a valid class 1 color-of-title claim is upon the applicants. A color-of-title application is properly rejected where the applicants claim a chain of title originating with a conveyance executed subsequent to a withdrawal for Federal purposes and within 20 years of the time the applicants learned of the title defect.

Grant F. & Jessie Fern Woodward, 87 IBLA 118 (May 31, 1985)

COMMUNICATION SITES

An appraisal by BLM of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in BLM's appraisal method or fails to show by convincing evidence that charges are excessive. In the absence of a showing of error that the appraisal methods used by

COMMUNICATION SITES--Continued

BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Glover Communications, Inc., 89 IBLA 276 (Nov. 8, 1985)

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Jancur, Inc., 93 IBLA 310 (Sept. 11, 1986)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 94 IBLA 167 (Oct. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

COMMUNICATION SITES--Continued

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal where an appellant fails to show the rental rate set by BLM is excessive.

Harvey Singleton, 101 IBLA 248 (Feb. 29, 1988)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show the rental rate is excessive. Absent a showing that appraisal methods used to set the rental rate are incorrect, a BLM appraisal may, in general, only be rebutted by another appraisal.

Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (Feb. 29, 1988)

Increased rental charges for a right-of-way issued under the Act of Mar. 4, 1911, and reappraised under 43 CFR 2802.1-7(a) (1979), are imposed "commencing with the ensuing charge year." The ensuing charge year is the rental year which begins following the date of the decision giving notice of the reappraisal and an opportunity for a hearing.

Pacific Bell, 104 IBLA 66 (Aug. 25, 1988)



COMMUNICATION SITES--Continued

BLM may reduce rental payments for communication site rights-of-way if it determines that the imposition of the fair market value rental would cause an undue hardship on the right-of-way holder or applicant.

High Country Communications, Inc., 105 IBLA 14 (Oct. 11, 1988)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Communications Enterprises, Inc., 105 IBLA 132 (Oct. 26, 1988)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Under 43 CFR 2803.1-2(b), a reduction or waiver of the rental rate for a right-of-way may be granted when the holder of the right-of-way provides without charge, or at a reduced rate, a valuable service to the public.

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

Approval of an application for a communication site right-of-way pursuant to sec. 501(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(5) (1982), is discretionary with the Department. A decision rejecting a single-user right-of-way application will be affirmed on appeal where it is predicated on the public interest in limiting authorized sites to multi-user facilities and

COMMUNICATION SITES--Continued

the evidence fails to establish a multi-user site would not adequately serve the applicant's needs.

Glenwood Mobile Radio Co., 106 IBLA 39 (Dec. 7, 1988)

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunications site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

COMMUNICATION SITES--Continued

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where there are multiple users of the same communication site, each user is individually responsible for the fair market rental value of the authorized use of the site.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

Where a BLM determination of the fair market rental value of a communications site right-of-way is based on a market study appraisal which does not comport with a proper application of the comparable lease method of appraisal and fails to provide data and analysis sufficient to determine the comparability of the right-of-way and private leases for similar

COMMUNICATION SITES--Continued

communications use, the Board will vacate the value determination and remand the case for reappraisal.

Joyce Communications, Inc., 111 IBLA 255 (Oct. 25, 1989)

CONFIDENTIAL INFORMATION

(See also Administrative Procedure: Public Information, Public Records--if included in this Index.)

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

"Proprietary information." Proprietary information means information, which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future, resulting in a substantial detrimental effect on a Government program. Internally generated Governmental conclusions and information are not generally proprietary.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

CONSTITUTIONAL LAW

## GENERALLY

While it is within the province of the judicial branch to adjudicate the constitutionality of statutes, it is outside the jurisdiction of the Board. The legislative history of the Act of July 6, 1960, 74 Stat. 334 (Sisk Act) shows Congress fully considered the constitutionality of the compensation provisions

CONSTITUTIONAL LAW--ContinuedGENERALLY--Continued

therein. The Department is bound to follow those provisions.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The Supreme Court has definitively established in United States v. Locke, 53 U.S.L.W. 4433 (Apr. 2, 1985), that the provisions of sec. 314 of FLPMA, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

In United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court held that sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), is constitutional. Sec. 314 provides that upon the failure of a mining claimant to timely file either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively presumed to be abandoned and void. Therefore, a mining claimant is not deprived of due process where his claim is rendered abandoned and void for failure to timely make the required filing.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

CONSTITUTIONAL LAW--ContinuedGENERALLY--Continued

Warrantless inspections under the Surface Mining Control and Reclamation Act of 1977 are constitutionally permissible.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

Florida Tribe of Eastern Creek Indians v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 269 (Oct. 10, 1985)

The Bureau of Indian Affairs and its officials are subject to the limitations imposed on the Federal Government by the United States Constitution.

The due process requirements of the Fifth Amendment to the United States Constitution are met through the administrative review afforded by the Board of Indian Appeals.

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against



CONSTITUTIONAL LAW--ContinuedGENERALLY--Continued

interstate commerce, and is fairly related to the services provided by the tribe.

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Based on the decision of the U.S. Supreme Court in Hodel v. Irving, U.S. 55 U.S.L.W. 4653 (U.S. May 18, 1987), that the escheat provisions of sec. 207 of the Indian Land Consolidation Act, as originally enacted, 96 Stat. 2519, are unconstitutional, escheats under that section must be disapproved in cases still pending for administrative determination.

Estate of Katie DeLaCruz & Estate of James Herbert Scarborough, 15 IBIA 198 (May 26, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of

CONSTITUTIONAL LAW--ContinuedGENERALLY--Continued

statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

DUE PROCESS

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required prior to a decision holding that such claims are invalid.

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Davis Exploration, 112 IBLA 254 (Dec. 28, 1989)

CONSTITUTIONAL LAW--ContinuedDUE PROCESS--Continued

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Heirs of Doreen Itta, Bernice Ahtuanguak, Mollie Itta, Wilber Ahtuanguak, 97 IBLA 261 (May 13, 1987)

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

CONSTITUTIONAL LAW--ContinuedDUE PROCESS--Continued

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

Under the circumstances of this case, the requirements of due process have been met through the administrative review procedures set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Delores Jean DeMarrias Martineau v. Area Director, Billings Area Office, Bureau of Indian Affairs, 16 IBLA 104 (Apr. 4, 1988)

An offer filed for an oil and gas lease creates no property interest. It is a mere hope or expectancy, and rejection of the offer does not violate constitutional due process where the land becomes unavailable for leasing prior to issuance of a lease.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

CONTESTS AND PROTESTS

(See also Administrative Procedure, Rules of Practice--if included in this Index.)

GENERALLY

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)  
92 I.D. 109

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a private contest filed by the State of Alaska against such a Native allotment based on the State's claim to certain lands within the allotment as existing Federal Highway Act rights-of-way, which contest is filed more than 180 days following enactment of ANILCA, must be dismissed.

State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (Dec. 4, 1985)

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)



## CONTESTS AND PROTESTS--Continued

### GENERALLY--Continued

The effect of a timely filed protest under sec. 905(a)(5)(C) of ANILCA is to preclude the allotment application from being subject to approval under sec. 905(a)(1) and to leave it within previously established administrative procedures to determine compliance with the Native Allotment Act.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Memmott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

Where BLM never adjudicated a timely protest to the filing of a notice of plat of survey, and the protest disputes the conclusion that a tract of land was an unsurveyed island at the time of the original survey, the protest may be referred for a hearing.

Jerome L. Kolstad, 93 IBLA 119 (July 28, 1986)

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance

## CONTESTS AND PROTESTS--Continued

### GENERALLY--Continued

of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met. United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

William B. Torgramson, Rosemary Ludvick v. Heirs & Devisees of Carl G. Carlson, 96 IBLA 209 (Mar. 19, 1987)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

The assumption required by 30 U.S.C. § 29 (1982) "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

Neither the assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

A state protest against approval of a Native allotment application filed pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982), which identifies with specificity the fact relied upon to show an access route is in conflict with the allotment requires adjudication of the allotment pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982).

State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (Aug. 17, 1988)

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

A protest of the acceptance of a notice of location of a homestead which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act,



CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

43 U.S.C. § 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

A field investigation report prepared by BLM is not a protest.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

Kootznookoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the

CONTESTS AND PROTESTS--ContinuedGENERALLY--Continued

denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim than a rival claimant. Approval of a mining plan of operations is based upon a determination that such operations will not result in unnecessary or undue degradation of Federal lands, and not on a determination that the party submitting the plan of operations will be able to conduct the proposed operations without trespassing on lands held by others. Therefore, one seeking to prevent operations outlined in a plan of operations submitted to BLM because such operations allegedly would result in trespass should seek such relief in a court of competent jurisdiction.

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

GOVERNMENT CONTESTS

Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to

CONTESTS AND PROTESTS--ContinuedGOVERNMENT CONTESTS--Continued

initiate a Government contest so that these issues can be resolved at a hearing.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

CONTRACT DISPUTES ACT OF 1978ATTORNEY FEESAllowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Under an EAJA application, the Government's contention that the hours claimed for attorneys and a consultant were excessive is rejected by the Board, where it finds that although the hours claimed in both categories appeared to be high upon an initial review, a careful examination of the detailed information submitted in support of the application convinced the Board that none of the time expended was unreasonable for the tasks undertaken and that each task was appropriate for proper representation.

Quality Seeding, Inc. (Application for Attorney Fees),  
IBCA-2552-F (Nov. 17, 1989) 96 I.D. 473

CONTRACT DISPUTES ACT OF 1978--ContinuedATTORNEY FEES--ContinuedPrevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted

CONTRACT DISPUTES ACT OF 1978--ContinuedATTORNEY FEES--ContinuedSubstantially Justified--Continued

to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees),  
IBCA-2132-F (Oct. 8, 1987)

The Government's position in contesting a contractor's claim for interest on a disputed construction claim paid pursuant to a settlement agreement was not substantially justified where: (1) the contracting officer ultimately paid the entire amount of the contractor's claim except for interest; (2) the contracting officer's decision denying entitlement to interest on the basis of noncertification was legally in error; (3) the contracting officer's affidavit that he thought interest was included in the settlement agreement had an insufficient basis and was patently inconsistent with other documents in the record; and (4) the appeal file compiled by the contracting officer inexplicably failed to include numerous documents that were essential to the proper resolution of the

CONTRACT DISPUTES ACT OF 1978--ContinuedATTORNEY FEES--ContinuedSubstantially Justified--Continued

dispute between the parties, thereby giving rise to questionable assertions by counsel.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

CONTRACTS

(See also Appeals, Claims Against the United States, Delegation of Authority, Labor, Rules of Practice--if included in this Index.)

GENERALLY

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision for rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)



CONTRACTS--Continued

## GENERALLY--Continued

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related

CONTRACTS--Continued

## GENERALLY--Continued

issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987)  
94 I.D. 86

The granting by the Board of a motion for dismissal or for summary judgment made by one party requires only that the Board assume the truth of the facts being asserted by the other party. It does not require that the Board accept either the theory of the case or the statement of the law being urged by that party. Nor, in the case of an affidavit, is the Board bound to assume that the facts as alleged by the affiant are true when there is substantial evidence to the contrary and the affiant's assertions are merely conclusory.

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a

CONTRACTS--ContinuedGENERALLY--Continued

purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

Changes or amendments to water district contracts that do not require the United States to (1) expend significant funds, (2) commit additional water supplies, or (3) substantially modify contract payments it receives, do not constitute supplemental or additional benefits within the meaning of sec. 203(a)(2) of the Reclamation Reform Act of 1982 (RRA), and do not trigger the application of the discretionary provisions of the RRA.

The "new or amended contract" language in secs. 105 and 106 of the coordinated Operations Agreement Legislation, Public Law 99-546 (1982), is to be construed consistently with secs. 203(a)(1) and (2) of the Reclamation Reform Act. Only new or amended contracts

CONTRACTS--ContinuedGENERALLY--Continued

that trigger either sec. 203(a)(1) or (2) are subject to the water rate provisions of secs. 105 and 106.

Interpretation of Sec. 203(a) of the Reclamation Reform Act of 1982 & Secs. 105 & 106 of Public Law 99-546, M-36959 (May 20, 1988)  
96 I.D. 199

The signing of an over-the-counter oil and gas lease offer by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease and creates a binding contract.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

Where the renewal of Friant Unit contracts contain substantially the same terms and conditions as the prior existing contracts an EIS or EA is not required. Such a renewal would constitute a nondiscretionary action and do nothing more than retain the status quo.

Renewal of Friant Unit Contracts, M-36961 (Nov. 10, 1988)  
96 I.D. 289

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989)  
96 I.D. 31

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION

Generally

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)

Where a contractor executes a contract which cites as the authority for its issuance one of two possible statutory provisions authorizing the making of such contracts, and the contractor fails to show that the cited statutory provision is not a proper authorization for the type of contract at issue, the Board refused (1) to consider parol evidence to read unstated provisions into the contract, (2) to consider for the same purpose the contractor's reliance on the Government's statements of policy when those statements do not rise to the level of law, and (3) to consider the contractor's evidence that it complied with the prerequisites for issuance of the contract under the alternate authority (which would provide the contractor with a more favorable system of cost reimbursement) as grounds for deeming the contract to be issued under that alternate authority after the

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Generally--Continued

parties agreed to issuance of the contract under the cited authority.

Where a contract establishes a system for reimbursement of costs and the Government imposes a new system unilaterally and without foundation in the contract, the new system is extra-contractual and may not be used to calculate the proper amount of reimbursement under the contract; the contract's terms require that the proper amount of reimbursement be calculated under the system established by those terms.

Appeal of Alamo Navajo School Board, Inc., IBCA-2123 et al. (Feb. 24, 1988)

Where there are divergent views of state officials concerning the interpretation of a provision of a lease maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), the Board will interpret the provision in accordance with general rules for construing contracts. When a royalty clause provides the lessee pay "sums equal to the value of gas produced and saved or utilized at the well, provided no gathering or other charges are made chargeable to lessor," the lessee may not deduct the cost of compressor fuel from royalties paid for gas used or flared on a sec. 6 lease.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Where it is clear in the record that the Government had information that the operation maintenance history of a dam facility indicated that the condition of the reservoir behind the dam could easily be out of the ordinary for a facility of its type and did not disclose that information to the contractor, then the Government is found liable to the contractor for the contractor's expenses in undertaking additional work beyond that contemplated on the assumption of a normal reservoir condition when the extraordinary conditions were in fact encountered and the disclosure of the



CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedGenerally--Continued

information would have led the contractor to bid and plan the project with those conditions in mind.

Appeal of Sanders Construction Co., IBCA-2309 (Oct. 25, 1989)

Actions of Parties

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985) 92 I.D. 172

Where under a construction contract for the installation of water meters, meter boxes, and service lines, it is determined by the contemporaneous conduct of the parties during performance of work that the contract specifications did not require the contractor to replace all existing service lines in order to fully perform under the contract, the Government was found to be without justification to invoke the unit price schedule in the bid form to reduce the total contract price for quantities of existing pipe not replaced by the contractor.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedActions of Parties--Continued

of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

A purchaser under a timber sale contract was entitled to be reimbursed for additional excess costs incurred, where upon instructions from the Government to perform end haul/clean up operations of debris, appellant was required to obtain additional equipment which was not listed as equipment required for the performance of the contract in a special provision. To the extent the contract provisions could be considered to be ambiguous, the interpretation placed upon the contract terms before the dispute arose was found to be controlling.

Theodore R. McNeely d/b/a Ted McNeely Logging, IBCA-1843 (Oct. 30, 1985)

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedActions of Parties--Continued

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2064 (Apr. 17, 1986)

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedActions of Parties--Continued

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986) 93 I.D. 455

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising, the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagreed on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied,

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Actions of Parties--Continued

where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for unreimbursed indirect costs is denied, where the contractor failed to comply with provisions of a cost-plus-fixed-fee contract which expressly provided for a method of adjusting of provisional indirect cost rates during performance of the contract. The evidence showed that the contractor never requested that indirect rates be renegotiated until after completion of the contract, and that the projected overrun was the result of a retroactive conversion by the contractor of the contract's dual indirect rates to a single-rate structure.

The Board denied a contractor's claim for unreimbursed indirect costs where the contractor failed to notify the contracting officer of a potential cost overrun as required by the Limitation of Funds Clause of the contract, or demonstrate that compliance with the Clause's notification requirement was excused.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16, 1988)



CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedActions of Parties--Continued

Where the Board found that a contract modification representing the settlement of certain claims against the Government did not represent the final integrated expression of the parties' agreement as it pertained to other claims that were not being settled, it allowed the introduction of parol evidence to ascertain the true intent of the parties as to effect of the modification. The Board further found that parol evidence established a mutual agreement differing from that suggested by the modification. Thus, the contractor was not barred from asserting its subsequent claim on the grounds of alleged accord and satisfaction or payment and release.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Where a contractor's conduct during performance of a tree-clearing contract strongly indicates that he understood that trimming was a significant part of the work, such conduct is considered persuasive evidence of what the contract required, in considering the contractor's claim for alleged extra costs incurred by such trimming.

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedActions of Parties--Continued

constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Allowable Costs

A contractor's claim for additional compensation for travel costs incurred during installation of a computer program package was allowed where language in the contractor's price list, incorporated by reference into the contract, specifically stated that the cost of installation was "exclusive of transportation and hotel costs," and there was no evidence that the Government rejected, amended, or withdrew such language from the contract prior to award. The Board found that the contractor made its intent manifest with respect to what was covered by its pricing proposal, and the Government accepted appellant's pricing structure by incorporating it into the contract.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedAllowable Costs--Continued

Where a contractor presented evidence of actual costs incurred for extra work and materials under the contract, such costs were presumed to be reasonable and established a prima facie case of recovery, which the Government failed to rebut.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general, and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedAllowable Costs--Continued

some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

A claim for overrun costs is denied where an invoice is relied upon as notice to the contracting officer of impending overrun without a showing that the contracting officer had knowledge of and encouraged the added work needed to complete contract performance.

Appeal of Decision Science Consortium, Inc., IBCA-1651-2-83 (Sept. 6, 1985) 92 I.D. 372

A contractor under a timber sale contract was entitled to recover costs incurred for the purchase of commercial rock when it could be determined from the evidence: (1) the total cubic yards of rock purchased by the contractor; (2) the cost per cubic yard; and (3) that such costs were reasonable.

Theodore R. McNeeley d/b/a Ted McNeeley Logging, IBCA-1844 (Oct. 23, 1985)

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a sub-mission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FKW, Inc., IBCA-1942 (Jan. 23, 1986)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedAllowable Costs--Continued

Where, in the context of a \$26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedAllowable Costs--Continued

officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

The Board finds disallowed costs under a cost-reimbursable contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1986) 93 I.D. 139

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV) IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

Where the evidence established that a contractor incurred certain extra costs during excavation of the spillway trench portion of a dam project, the Board held, by the jury verdict approach, that appellant was entitled to a portion of such additional costs in the amount of \$32,500.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)

Where a contractor appeals from a Government claim for repayment of overhead expense applied to the salaries of three individuals designated by the contractor as consultants solely for benefits accruing to the individuals, but who were in all other respects treated as employees in the contract budget and actual performance, we find the individuals to be employees whose salaries were properly included in the direct salary base for reimbursement of overhead expense.

Appeal of Northern Illinois University, IBCA-2067  
(Feb. 26, 1987)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

Where the Government defended against an appeal seeking additional costs for performance on the ground that the contractor had followed an unpermitted change in its accounting system in reaching the amount of the costs sought, the Board noted that a change in a contractor's accounting system is no bar to recovery unless it has a prejudicial effect on the Government and, having determined that the Government had shown no such prejudice, held that the accounting system change was no bar to recovery in this case.

Where the contracting officer, being aware that the contractor had incurred costs up to or beyond the ceiling of the contract's limitation of costs clause, nevertheless communicated his urgent desire that the contractor continue to perform, the Board held that the limitation clause had been waived and that it could not be used to bar recovery of reasonable, allowable costs above the limit incurred in performing the contract.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (Aug. 31,  
1987)  
94 I.D. 373

A claim for overrun costs under a purchase order calling for the fabrication and installation of highway signs is denied when the appellant fails to show (i) that any work performed was in excess of that required by the contract; (ii) that timely notice of an impending overrun could not have been given if its accounting system had been adequate; and (iii) that the contracting officer was chargeable with constructive knowledge of the impending overrun.

Appeal of State of Alabama Highway Dept., IBCA-2362  
(Dec. 10, 1987)

A contractor's claim for unreimbursed indirect costs is denied, where the contractor failed to comply with provisions of a cost-plus-fixed-fee contract which expressly provided for a method of adjusting provisional indirect cost rates during performance of the contract. The evidence showed that the contractor never requested that indirect rates be renegotiated until after completion of the contract, and that the projected overrun was the result of a retroactive

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Allowable Costs--Continued

conversion by the contractor of the contract's dual indirect rates to a single-rate structure.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16, 1988)

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

A contractor's claim for additional termination costs was not allowable where the evidence showed that but for the contractor's failure to comply with the specifications and its performance inefficiencies, such expenses would not have been incurred.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Changed Conditions\_(Differing Site\_Conditions)

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changed Conditions\_(Differing Site\_Conditions)--Continued

entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included, core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985) 92 I.D. 237

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changed Conditions\_(Differing Site\_Conditions)  
--Continued

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changed Conditions\_(Differing Site\_Conditions)  
--Continued

infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144 (Nov. 30, 1987)

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989)

Changes and Extras

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985)



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

The Board finds that a contractor is not entitled to additional compensation for the quality of finishing required on concrete work involved in the construction of raceways (rearing areas) at a fish hatchery where the concrete subcontractor contends (i) that the finishing required was superior to the finish it had anticipated would be sufficient for the project and (ii) that the finish achieved by a specified date was "nicer" than the finish on existing raceways but the Board finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards clearly set forth in the contract specifications.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985) 92 I.D. 284

When the Government properly terminates a contract for its convenience, the contractor is entitled only to proper settlement costs incurred thereafter; a contractor may not recover expenses incurred in continuing performance after receiving the notice of termination where the Government did not desire such termination and where the contractor, in ignoring the termination notice, relied on a memorandum which: (1) was written by a Government official unconnected with administration of the contract; (2) was addressed to someone other than the contractor; and (3) was dated 2 months before the termination and acquired by the contractor 1 month after the termination.

Appeal of Development & Technical Associates, Inc., 355 IBCA-1510-8-81 (Aug. 13, 1985) 92 I.D. 355

The Board holds that a constructive change occurred, entitling a timber sale purchaser to an equitable adjustment for unanticipated extra costs, upon finding: that a Government-owned aggregate stockpile, designated as a suitable source for road work required to be performed by the purchaser, proved to be inadequate; that the purchaser had relied on the availability of such source for his performance of the contract; and that it was reasonable for him, under the existing conditions, to then incur extra costs in order

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

to obtain the necessary aggregate from a commercial pit.

Theodore R. McNeeley d/b/a Ted McNeeley Logging, IBCA-1844 (Oct. 23, 1985)

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer) the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedChanges and Extras--Continued

the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedChanges and Extras--Continued

the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 92

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

machinery costs incurred in connection with the patching.

Appeal of Yazzie Construction Co., IBCA-2104 (Apr. 30 1986) 93 I.D. 191

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagreed on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

A claim for the costs involved in cutting and rewelding slide frames for four headgates under a contract for the construction of a dam is denied, where the cutting and rewelding performed were found to result from the contractor's choice of construction method for which it was not entitled to additional compensation.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

A contracting officer's direction to a contractor to provide its pilots with a minimum of 1 hour of flight training instruction is found to constitute a constructive change where the Board finds that the contract provisions relied upon by the contracting officer in issuing the directive do not support the Government's position that the directed instruction was to be given at the contractor's expense.

Appeal of Troy Air, Inc., IBCA-2370-A & 2371-A (Sept. 28, 1988) 95 I.D. 195

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedChanges and Extras--Continued

merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989)  
96 I.D. 189

The Board finds that where the award of a base bid is interpreted by the contractor to be restricted to one unit of a building, and that broader language in the specifications applying to all units creates inconsistencies, the interpretation of the contractor is reasonable and preferred to that of the Government which leaves unexplained inconsistencies; and that the intent of the parties to confine the base bid work to the one unit is evident from the drawings and the prevailing circumstances which necessitated ordering a portion of the unawarded alternative bid to protect the work from extreme weather conditions.

Appeal of Titan Construction, Inc., IBCA-2366 (Apr. 25, 1989)

Conflicting Clauses

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedConflicting Clauses--Continued

In a case involving an Office of Aircraft Services Contract containing conflicting clauses which the contractor construes as providing for payment at contract rates for the availability of two aircraft during the period of relocation flights from a reporting base to releasing bases, the Board finds the contractor's interpretation of the ambiguous provisions to be reasonable and that under the contra proferentem rule such provisions will be construed against the Government.

Appeal of Troy Air, Inc., IBCA-2370-A & 2371-A (Sept. 28, 1988)  
95 I.D. 195

Language in the technical provisions of a contract which required the contractor to "coordinate" various aspects of electrical motor components in order to ensure proper operation of the unit, in context of the whole contract, was found not to be sufficient to transform the fundamental design character of the specifications into a performance-type contract.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Construction\_Against\_Drafter

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986)  
93 I.D. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Construction\_Against\_Drafter--Continued

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Construction\_Against\_Drafter--Continued

In a case involving an Office of Aircraft Services Contract containing conflicting clauses which the contractor construes as providing for payment at contract rates for the availability of two aircraft during the period of relocation flights from a reporting base to releasing bases, the Board finds the contractor's interpretation of the ambiguous provisions to be reasonable and that under the contra proferentem rule such provisions will be construed against the Government.

Appeal of Troy Air, Inc., IBCA-2370-A & 2371-A  
(Sept. 28, 1988) 95 I.D. 195

Contract\_Classes

A contractor's claim for additional compensation under a tree-planting contract was denied because the contractor's interpretation of Bid Schedule language regarding the planting method was held to be unreasonable, as such interpretation would have effectively eliminated the planting requirements contained in the contract specifications. The Government's interpretation reconciled these provisions by demonstrating that no ambiguity existed within the contract terms, and that the most reasonable interpretation of the term "plant in Rip" was that it expressed the preference of the Government for the contractor to plant in ripped areas, not exclusively, but whenever possible within the spacing requirements of the contract.

Southern Oregon Reforestation, Inc., IBCA-1602-7-82  
(February 26, 1985)

Where, in the context of a \$26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contract\_Classes--Continued

contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContract\_Clauses--Continued

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

Upon finding that a contract clause, permitting a price adjustment in multiyear and option contracts, confined the adjustment to actual increases or decreases during the option or renewal periods of the contract, and that the contractor claimed an adjustment for the initial period of the contract upon receiving notice after the award of an increase in Federal and state unemployment taxes, the Board denies the appeal because it could find no other contract clause permitting an adjustment for the initial period of the contract.

Appeal of Eagle Security, Div. of Nadoco, Inc., IBCA-1917 (July 24, 1986)

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract commences, the contractor's claim for the timber in addition to its costs and a reasonable profit on the

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContract\_Clauses--Continued

work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1908 (Aug. 13, 1986)

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Claterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986) 93 I.D. 358

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Contract\_Classes--Continued

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Contract\_Classes--Continued

Under the Permits and Responsibilities clause of a firm, fixed-price standard construction contract, the contractor is liable for a tax imposed by an Indian tribe on a construction project where the tribe alleges that the project is within reservation boundaries and the contractor elects to pay the tax rather than contest it. A Government contracting agency is not required to determine the boundaries of the Indian reservation before soliciting bids on the project.

Regardless of the precise location of the boundary of an Indian reservation, a construction contractor under a firm, fixed-price contract is not entitled to additional compensation where an Indian tribe, after the construction had commenced, imposed a tax on the project that the contractor had not anticipated when making its bid, in circumstances where the Government in its solicitation documents had called attention to the possibility that the tax might be imposed by the tribe.

Appeal of Humphrey Construction, Inc., IBCA-2266 & 2267 (June 11, 1987)  
94 I.D. 204

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987)  
94 I.D. 368

The Board denied a contractor's claim for unreimbursed indirect costs where the contractor failed to notify the contracting officer of a potential cost overrun as required by the Limitation of Funds Clause



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Contract\_Clauses--Continued

of the contract, or demonstrate that compliance with the Clause's notification requirement was excused.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16, 1988)

Where a contractor is aware prior to bidding that the electrical conduit portion of a fixed-price construction contract solicitation lacks a pay item for PVC-coated pipe, contrary to past agency practice, and the contractor is uncertain how the extra cost of the PVC-coated pipe will be allocated to contractor cost, a patent ambiguity exists; and the contractor is bound to inquire into the matter rather than assuming that a change order will be issued to cover the additional costs. Where no inquiry was made, and the contracting officer subsequently declined to issue a change order, the contractor will be held to the amount of its fixed-price bid.

Appeal of Western States Construction Co., Inc., IBCA-2279 (June 20, 1988)

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Contract\_Clauses--Continued

A contractor's claim on reconsideration, for an equitable adjustment for extra trimming work incurred during performance of a tree-clearing contract along the North Rim of the Grand Canyon National Park, was denied, where the Board concluded that the contractor's application of an industry practice which would allow it to leave untrimmed hundreds of limbs extending into the contract cutting zone, was inconsistent with the objective of the contract, which was to trim such limbs to a 12-foot canopy so as to provide greater visibility and safety for motorists traveling along the 22.3 miles of roadway leading into the Park.

Appeal of Hal Allred (On Appellant's Motion for Reconsideration), IBCA-2447-A (May 8, 1989)

An "act of God" is a natural event causing adverse economic consequences that, because of its rarity, intensity, magnitude, location, duration, and/or time of occurrence, was not reasonably foreseeable. An act of God requires something more than an ordinary natural occurrence at the time and place involved, and its adverse consequences must not be primarily attributable to anyone's negligence.

Where a construction contractor's site was damaged by water runoff from another contractor's construction site (1) in the context of a general rainstorm exceeding the 100-year level; (2) where even the finished overall project as designed would not be protected beyond the 100-year storm level; (3) where damage to the first contractor's site probably would have occurred even if the second contractor were not contributorily negligent; (4) where the second contractor was not proved to be negligent in its construction methods under the circumstances; and (5) where there is evidence that the first contractor was at least as negligent as the second contractor may have been in causing the damage, the rainstorm was an act of God, and the first contractor is not entitled to recover its clean-up costs; and if the Government chooses to indemnify the first contractor for these costs, it

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContract\_Clauses--Continued

does so as a volunteer and not because it was liable for such costs under SF 23-A.

Appeal of Peter Kiewit Sons' Co., IBCA-1789 (Dec. 14, 1989) 96 I.D. 487

Contracting Officer

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impasse, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D. 255

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContracting Officer--Continued

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received,



CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContracting Officer--Continued

and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simpson, IBCA-2058 (Feb. 24, 1986) 93 I.D. 76

The Board finds disallowed costs under a cost-reimbursable contract with an educational institution to be allowable where additional documentation provided the contracting officer indicated that the disallowances resulted from occasional lapses, errors, or omissions in an otherwise accurate accounting system and that the contracting officer had not exercised his independent judgment to review such evidence respecting costs questioned by the auditor.

Appeal of Louisiana State University, IBCA-2057 (Mar. 21, 1986) 93 I.D. 139

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Maxima Corp., IBCA-1828 (Apr. 1, 1986) 93 I.D. 151

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContracting Officer--Continued

Where the contracting officer, by letter to the contractor, designated a refuge manager as supervisor of the contract work at the refuge where the work was to be performed, pursuant to a contract provision which includes the duly appointed successor or authorized representative in the definition of "contracting officer," and where the specifications named the refuge manager as the one with whom the work was to be scheduled in order not to interfere with the operation of the refuge, the Board rejects the argument of apparent authority and finds express authority for the refuge manager to control the work.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 24, 1986)

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986) 93 I.D. 455

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contracting Officer--Continued

let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PPA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

Appeal of Columbia Engineering Corp., IBCA-2351 & 2352 (Mar. 7, 1988) 95 I.D. 35

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Contracting Officer--Continued

The Board rejected a contractor's contention that the Government was estopped to deny alleged representations of a contracting officer, where it was found that no credible evidence, other than the allegations made in an affidavit of the contractor's president, substantiated the contractor's claim that the contracting officer induced the contractor to ignore the notification requirements of the Limitation of Funds Clause, or to forego the negotiation of a more suitable rate structure for its indirect costs under the contract.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16, 1988)

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989) 96 I.D. 257

Contractor

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985) 92 I.D. 146

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedContractor--Continued

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV)  
IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

Differing Site Conditions (Changed Conditions)

Formal written notice given after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer, where the evidence shows that the Government had actual knowledge of the operative facts relating to the contractor's claim and no showing was made that any prejudice to the Government had resulted from the belated written notice.

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDiffering Site Conditions (Changed Conditions)  
--Continued

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included, core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985)  
 92 I.D. 237

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

A contractor was found not to be eligible for an equitable adjustment based upon a Category I differing site condition, because the contract documents failed to offer any indications regarding site conditions, and thus, there was no basis upon which the contractor could have relied in preparing its bid.

Where the record indicates that the components contained in Government-designated borrow material were neither unusual, unknown or materially different from what the contractor should have expected, but rather

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Differing Site\_Conditions (Changed\_Conditions)  
--Continued

allegedly contained an inordinate amount of moisture due to rain and snowfall, the contractor's claim for an equitable adjustment, based on a Category II differing site condition is denied, given the long-standing rule that weather conditions do not constitute a valid basis for a differing site conditions claim.

In-Line Construction, IBCA-1909 (Dec. 19, 1985)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Yazzie Construction Co., IBCA-2104 (Apr. 30, 1986)  
93 I.D. 191

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Differing Site\_Conditions (Changed\_Conditions)  
--Continued

The Board holds that the contractor failed to sustain its burden of establishing entitlement to any of its claims for extra costs; that such costs were the direct result of the contractor's failure to make a reasonable site investigation, together with its failure to carefully read the contract drawings and the specifications, prior to submitting its bid. In such circumstances the risk of incurring such costs must fall upon the contractor and not upon the Government.

Appeal of Bowie & K Enterprises, Inc., IBCA-1788 (Oct. 7, 1986)

A contractor's claim for an equitable adjustment, due to an alleged differing site condition encountered during the pile-driving portion of a residential construction project, was denied, under both a category I and category II claim, where the Board found that the contractor failed to prove what the alleged encountered subsurface condition was. The Board held that proof of subsurface conditions cannot be shown in the abstract, but must be established in the light of geological data and other relevant and probative evidence.

Appeal of Straub Construction Co., IBCA-2291-A (Aug. 19, 1987)

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)  
--Continued

demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144  
(Nov. 30, 1987)

Where a contractor seeks to prove that the actual site conditions varied from contract indications respecting the width and shape of sealant to be removed and replaced between concrete panels of an aqueduct system, and notice to the Government is given after the entire 600,000 feet of joints had been mechanically extruded to partially remove the old sealant, the evidence offered by appellant is found to be inadequate to show a comparison between actual and contract-indicated conditions necessary to prove the existence of a differing site condition.

Appeal of Mingus Constructors, Inc., IBCA-2117 (Feb. 9, 1988)  
95 I.D. 25

A Government motion to dismiss a claim of differing site conditions is denied where the motion is based upon a purported accord and satisfaction attributed to the contractor accepting a change order and a supplement thereto but the Board notes that an accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord entitling appellant to an oral hearing as requested.

Appeal of T. Ferguson Construction, Inc., IBCA-2365  
(May 3, 1988)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)  
--Continued

Where a contractor makes a written request for an increase in price based on a claim of a differing site condition, and 2 days after receipt by the contracting officer, re-delivers all Government-furnished fencing materials and insists on abandoning performance of the contract on the following day, the Board finds no evidence supporting the differing site condition and finds the termination for default to be proper.

Appeal of Harland Jones & R. Jackie Bowen (Contractors), IBCA-2444 (May 2, 1989)

Drawings and Specifications

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831  
(Mar. 26, 1985)  
92 I.D. 146

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985)  
92 I.D. 237

A dispute under a construction contract as to whether a waterstop is required for interior walls at expansion joints is resolved in the Government's favor where its interpretation effects a reconciliation between the requirements in the contract drawings for fixed, nonmovable construction joints and those for movable expansion/contraction joints.

The Board finds that a contractor is not entitled to additional compensation for the quality of finishing required on concrete work involved in the construction of raceways (rearing areas) at a fish hatchery where the concrete subcontractor contends (i) that the finishing required was superior to the finish it had anticipated would be sufficient for the project and (ii) that the finish achieved by a specified date was "nicer" than the finish on existing raceways but the Board finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards clearly set forth in the contract specifications.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985)  
92 I.D. 284

Where a contracting officer asserted that the contract was negotiated in contemplation of drilling a total of 28,150 feet of test holes and reduced the lump sum price for the contract when the total amount of drilling fell short of 28,150 feet, the Board found that the drilling specifications did not require a specific total of drilling and since the amount of drilling accomplished had Government approval, the contractor was entitled to the full lump sum contract price.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

In a dispute over claimed compensation for additional work in a contract for burning of brush and other vegetation in a remote site, where the contract clause allowing compensation contained an exception for such work caused by the contractor's fault or negligence, the Board (1) held that the specifications and drawings on method of performance were not ambiguous, and that even if they were, the contractor had failed in his duty to inquire so as to clear up any ambiguity; (2) found that the contractor's method of performance did not comply with the contractor's prescribed method; (3) found that the contractor's non-complying method had caused the conditions that led to the need for the additional work; and (4) denied the



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

appeal on the ground that the additional work was caused by the contractor's fault or negligence.

Appeal of Sam McKee, IBCA-1790 (Sept. 27, 1985)

The Board holds that a constructive change occurred, entitling a timber sale purchaser to an equitable adjustment for unanticipated extra costs, upon finding: that a Government-owned aggregate stockpile, designated as a suitable source for road work required to be performed by the purchaser, proved to be inadequate; that the purchaser had relied on the availability of such source for his performance of the contract; and that it was reasonable for him, under the existing conditions, to then incur extra costs in order to obtain the necessary aggregate from a commercial pit.

Theodore R. McNeely d/b/a Ted McNeely Logging, IBCA-1844 (Oct. 23, 1985)

The Board holds that an irrigation project contractor failed to prove its case for an equitable adjustment, either on the theory of defective specifications or constructive change, where the contract-blasting specifications authorized the Bureau of Reclamation to apply or modify, at its discretion, a maximum peak particle velocity limitation for blasting vibration and damage control. Finding that the specification was aimed at protecting an old wooden flume used to irrigate about 2,300 acres of valuable orchard lands, and that damage to the flume could easily have jeopardized the entire project objective and wasted thousands of construction cost dollars, the Board also holds, in the circumstances, that the Bureau of Reclamation did not abuse or unreasonably exercise its discretion by first imposing the restriction and later relaxing it when satisfied the flume would not be damaged.

Appeal of Copenhagen Utilities & Construction, Inc., IBCA-1829 (Oct. 25, 1985)

92 I.D. 525

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

A contractor's claim for an equitable adjustment based upon delays incurred as a result of the Government's application of alleged restrictive specifications, was denied where the Government made a prima facie showing that the specifications relating to dam construction equipment reasonably related to its needs, and the contractor failed to meet its burden that such requirements unduly restricted the use of commercially manufactured equipment or required the fabrication of special equipment to perform the work.

In-Line Construction, IBCA-1909 (Dec. 19, 1985)

Where, in the context of a \$26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Drawings\_and\_Specifications--Continued

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

A claim for the costs involved in cutting and rewelding slide frames for four headgates under a contract for the construction of a dam is denied, where the cutting and rewelding performed were found to result from the contractor's choice of construction

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

method for which it was not entitled to additional compensation.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

Where the Board found that the contractor: (1) failed to prove by a preponderance of the evidence, that the specifications regarding the cement mix for the concrete construction of fish hatchery raceways were defective; (2) had not complied with the concrete curing and protection specifications which required keeping and freshly placed concrete from premature drying; and (3) as a result, failed to initially achieve a smooth form concrete finish as required by the contract, the claim of the contractor for the cost of a filler/sealer process, to ultimately accomplish the required smooth form concrete finish, was denied on the ground that such process was corrective or remedial work and not extra work as alleged by the contractor.

Appeal of Speer Construction Co., Inc., IBCA-2164 (May 24, 1988)

Where a contractor is aware prior to bidding that the electrical conduit portion of a fixed-price construction contract solicitation lacks a pay item for PVC-coated pipe, contrary to past agency practice, and the contractor is uncertain how the extra cost of the PVC-coated pipe will be allocated to contract cost, a patent ambiguity exists, and the contractor is bound to inquire into the matter rather than assuming that a change order will be issued to cover the additional costs. Where no inquiry was made, and the contracting officer subsequently declined to issue a change order, the contractor will be held to the amount of its fixed-price bid.

Appeal of Western States Construction Co., Inc., IBCA-2279 (June 20, 1988)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

Where a contract's plans and specifications relating to a highly technical electrical motor application contained numerous "design characteristics," including the specificity and detail commonly associated with design specifications, and expert testimony indicated that it was customary for a single engineering entity to design that type of completely integrated system, it was found that such plans and specifications could be reasonably interpreted by a prudent contractor to place design responsibility for the system on the Government.

Language in the technical provisions of a contract which required the contractor to "coordinate" various aspects of electrical motor components in order to ensure proper operation of the unit, in context of the whole contract, was found not to be sufficient to transform the fundamental design character of the specifications into a performance-type contract.

The Government was held to have wrongfully rejected hoist-gate gear motors furnished by a contractor for use on an aqueduct project, where for purposes of determining compliance with the technical specifications of the contract, the Government had employed improper output restrictions during the belated testing of such motors, and the evidence of record and the weight of expert testimony established that the motors when submitted met the requirements of the contract and of approved submittals.

Where a contractor demonstrated that it had installed an integrated hoist-gate system for an aqueduct project strictly in accordance with the detailed drawings and specifications designed and furnished by the Government, and the system as installed would not meet the performance requirements of the contract, the Board held that the failure of the system was not due to any fault of the contractor but resulted from the defective design of the Government.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedDrawings\_and\_Specifications--Continued

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Duration\_of\_Contract

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Duty\_to Inquire

In a dispute over claimed compensation for additional work in a contract for burning of brush and other vegetation in a remote site, where the contract clause allowing compensation contained an exception for such work caused by the contractor's fault or negligence, the Board (1) held that the specifications and drawings on method of performance were not ambiguous, and that even if they were, the contractor had failed in his duty to inquire so as to clear up any ambiguity; (2) found that the contractor's method of performance did not comply with the contractor's prescribed method; (3) found that the contractor's non-complying method had caused the conditions that led to the need for the additional work; and (4) denied the appeal on the ground that the additional work was caused by the contractor's fault or negligence.

Appeal of Sam McKee, IBCA-1790 (Sept. 27, 1985)

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Duty\_to Inquire--Continued

inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

Where a contractor is aware prior to bidding that the electrical conduit portion of a fixed-price construction contract solicitation lacks a pay item for PVC-coated pipe, contrary to past agency practice, and the contractor is uncertain how the extra cost of the PVC-coated pipe will be allocated to contract cost, a patent ambiguity exists; and the contractor is bound to inquire into the matter rather than assuming that a change order will be issued to cover the additional costs. Where no inquiry was made, and the contracting officer subsequently declined to issue a change order, the contractor will be held to the amount of its fixed-price bid.

Appeal of Western States Construction Co., Inc., IBCA-2279 (June 20, 1988)

A contractor's claim under an Office of Aircraft Services contract for actual flight time during relocation of two aircraft from their reporting base to their releasing bases is denied, where the Board finds the contract provisions in issue to be patently ambiguous requiring the contractor to seek clarification from the Government before resolving the ambiguity in its own favor.

Appeal of Troy Air, Inc., IBCA-2370-A & 2371-A (Sept. 28, 1988) 95 I.D. 195

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor faced with an obvious inconsistency or discrepancy of significance, is obliged

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Duty to Inquire--Continued

to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989) 96 I.D. 62

Estimated Quantities

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor counters different types and lengths of service lines as indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedEstimated Quantities--Continued

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

General Rules of Construction

A contractor's claim for additional compensation under a tree-planting contract was denied because the contractor's interpretation of Bid Schedule language regarding the planting method was held to be unreasonable, as such interpretation would have effectively eliminated the planting requirements contained in the contract specifications. The Government's interpretation reconciled these provisions by demonstrating that no ambiguity existed within the contract terms, and that the most reasonable interpretation of the term "Plant in Rip" was that it expressed the preference of the Government for the contractor to plant in ripped areas, not exclusively, but whenever possible within the spacing requirements of the contract.

Southern Oregon Reforestation, Inc., IBCA-1602-7-82 (February 26, 1985)

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedGeneral Rules of Construction--Continued

A contractor's claim for additional compensation for travel costs incurred during installation of a computer program package was allowed where language in the contractor's price list, incorporated by reference into the contract, specifically stated that the cost of installation was "exclusive of transportation and hotel costs," and there was no evidence that the Government rejected, amended, or withdrew such language from the contract prior to award. The Board found that the contractor made its intent manifest with respect to what was covered by its pricing proposal, and the Government accepted appellant's pricing structure by incorporating it into the contract.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

Wyman Construction, Inc., IBCA-1669-4-83 (May 31, 1985)  
92 I.D. 237

A dispute under a construction contract as to whether a waterstop is required for interior walls at expansion joints is resolved in the Government's favor where its interpretation effects a reconciliation between the requirements in the contract drawings for



CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

fixed, nonmovable construction joints and those for movable expansion/contraction joints.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985)  
92 I.D. 284

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

A motion for reconsideration is denied where the authority relied upon by appellant in support of its motion is found to be distinguishable from the facts of the instant case, and no other arguments or insights are presented which were not previously considered by the Board and rejected.

Appeal of Wyman Construction, Inc., IBCA-1669-4-83 (Aug. 21, 1985)

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

A purchaser under a timber sale contract was entitled to be reimbursed for additional excess costs incurred, where upon instructions from the Government to perform end haul/clean up operations of debris, appellant was required to obtain additional equipment which was not listed as equipment required for the performance of the contract in a special provision. To the extent the contract provisions could be considered to be ambiguous, the interpretation placed upon the contract terms before the dispute arose was found to be controlling.

Theodore R. McNeely d/b/a Ted McNeely Logging, IBCA-1843 (Oct. 30, 1985)

Where, in the context of a \$26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since,

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedGeneral Rules of Construction--Continued

in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

A contract is not ambiguous merely because there is imperfect correspondence between its specifications and its pay items. Thus, a contractor is not entitled to additional compensation for work that is clearly required by its contract, even though such work is not expressly included, or is arguably inadequately included, in the specific pay items of the contract.

Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV),  
IBCA-1566-3-82 (Mar. 25, 1986) 93 I.D. 144

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Claterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986) 93 I.D. 358

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedGeneral Rules of Construction--Continued

Where a contract contains a latent ambiguity as to payment for fire-seal support brackets required to be installed in a pump-room shaft opening, and such brackets are not an integral or essential part of the pump-support brackets for which the contract provides payment, a subcontractor's interpretation that it will be paid separately for installation of the fire-seal brackets is not unreasonable and will be sustained.

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "[i]ninstall supply and drain piping using Government-furnished . . ." and contractor furnished pipe as required . . ." was unreasonable, and did not justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

Where a contract's plans and specifications relating to a highly technical electrical motor application contained numerous "design characteristics," including the specificity and detail commonly associated with design specifications, and expert testimony indicated that it was customary for a single engineering entity to design that type of completely integrated system, it was found that such plans and specifications could be reasonably interpreted by a prudent contractor to place design responsibility for the system on the Government.

Language in the technical provisions of a contract which required the contractor to "coordinate" various aspects of electrical motor components in order to ensure proper operation of the unit, in context of the whole contract, was found not to be sufficient to transform the fundamental design character of the specifications into a performance-type contract.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during the performance of a tree-clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor, faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

A contractor's claim on reconsideration, for an equitable adjustment for extra trimming work incurred during performance of a tree-clearing contract along the North Rim of the Grand Canyon National Park, was denied, where the Board concluded that the contractor's application of an industry practice which would allow it to leave untrimmed, hundreds of limbs extending into the contract cutting zone, was inconsistent with the objective of the contract, which was to trim such limbs to a 12-foot canopy so as to provide greater visibility and safety for motorists traveling along the 22.3 miles of roadway leading into the Park.

Appeal of Hal Allred (On Appellant's Motion for Reconsideration), IBCA-2447-A (May 8, 1989)

A contractor's claim for excess costs incurred as a result of an alleged ambiguity in language pertaining to the method of work to be employed under a timber stand improvement contract was denied, where an analysis of the pertinent contract language, read as a whole, showed that the Government's requirements were



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

General Rules of Construction--Continued

reasonably clear and thus, not ambiguous. Such conclusion by the Board rendered the contractor's interpretation unreasonable, and thus, did not entitle the contractor to the relief requested.

Appeal of Lonnie Gene Partout, IBCA-2280 (Dec. 12, 1989)

Government-furnished Property

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "[i]n stall supply and drain piping using Government-furnished . . . and contractor furnished pipe as required . . ." was unreasonable, and did not justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Intent of Parties

Where a contracting officer asserted that the contract was negotiated in contemplation of drilling a total of 28,150 feet of test holes and reduced the lump sum price for the contract when the total amount of drilling fell short of 28,150 feet, the Board found that the drilling specifications did not require a specific total of drilling and since the amount of drilling accomplished had Government approval, the

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

contractor was entitled to the full lump sum contract price.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a sub-mission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FKW, Inc., IBCA-1942 (Jan. 23, 1986)

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Where a road repaving contractor bids on the basis of a visual inspection indicating a limited number of road surface spots needing patching before resurfacing, and that number is reasonably consistent with the number that is estimated by the project engineer, but at the preconstruction conference after the award, the contractor is alerted for the first time to the possibility of roadbed failure, and it subsequently experiences such failure, being required to use 2,272 tons of asphalt for patching rather than the 250 tons it had estimated or the 280 tons the project engineer had estimated, it is entitled to compensation under the differing site conditions clause not only for the extra asphalt used, but also for the additional labor and machinery costs incurred in connection with the patching.

Appeal of Yazzie Construction Co., IBCA-2104 (Apr. 30, 1986)  
93 I.D. 191

Where a contract contains a latent ambiguity as to whether embedded pipe supports will be paid for as part of the piping system or separately under the heading of pipe supports, and (a) the pipe support payment provision of the contract makes no distinction between embedded and external pipe supports, (b) the contractor relied upon the pipe support provision rather than upon the piping system provision for payment, and (c) the contractor's costs for the embedded pipe supports were as high as its costs for external supports, the contractor's interpretation of the contract was not unreasonable, and the latent ambiguity will be resolved in its favor.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising, the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987)  
94 I.D. 221

Where the award schedule of an apparent firm fixed-price bridge rehabilitation construction contract was arguably ambiguous as to whether its quantities were definite or variable, and the contractor, relying on the contract price and on the Government's approval of the change, substituted thicker lumber, thus requiring fewer planks but resulting in no cost savings to the contractor, the Government was not permitted to reduce the contract amount by a computation based on the lesser number of planks utilized, because the contractor's interpretation was found to be reasonable; the contract document was construed against the Government as drafter; and the Variation in Estimated Quantity Clause of the contract, in any event, arguably took precedence over the pay provisions of FP-85 on which the Government's computations were based.

Appeal of Harney County Gypsum Co., IBCA-2345 (Mar. 10, 1988)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

Where the Board found that a contract modification representing the settlement of certain claims against the Government did not represent the final integrated expression of the parties' agreement as it pertained to other claims that were not being settled, it allowed the introduction of parol evidence to ascertain the true intent of the parties as to effect of the modification. The Board further found that parol evidence established a mutual agreement differing from that suggested by the modification. Thus, the contractor was not barred from asserting its subsequent claim on the grounds of alleged accord and satisfaction or payment and release.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

The Board finds that where the award of a base bid is interpreted by the contractor to be restricted to one unit of a building, and that broader language in the specifications applying to all units creates inconsistencies, the interpretation of the contractor is reasonable and preferred to that of the Government which leaves unexplained inconsistencies; and that the intent of the parties to confine the base bid work to

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Intent of Parties--Continued

the one unit is evident from the drawings and the prevailing circumstances which necessitated ordering a work of the unawarded alternative bid to protect the work from extreme weather conditions.

Appeal of Titan Construction, Inc., IBCA-2366 (Apr. 25, 1989)

Labor Laws

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PFA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

Appeal of Columbia Engineering Corp., IBCA-2351 & 2352 (Mar. 7, 1988) 95 I.D. 35



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Modification\_of ContractsGenerally

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985)  
92 I.D. 378

A Government motion to dismiss a claim of differing site conditions is denied where the motion is based upon a purported accord and satisfaction attributed to the contractor accepting a change order and a supplement thereto but the Board notes that an accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord entitling appellant to an oral hearing as requested.

Appeal of T. Ferguson Construction, Inc., IBCA-2365  
(May 3, 1988)

Unspecific, standard release language in a contract modification is sufficient to dispose only of those matters to which it clearly relates and/or which were within the contemplation of the parties. A boilerplate claims release clause contained in a no-fault time-extension modification is not sufficient to release additional contractor cost claims that the parties have never considered.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989)  
96 I.D. 31

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Modification\_of Contracts--ContinuedGenerally--Continued

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

The Board finds that a contractor's unqualified acceptance of the Government's offer of payment for an ordered change to constitute an accord and satisfaction, barring further claims for payment for the same change, and dismisses the appeal.

Hawkins & Powers Aviation, Inc., IBCA-2387 (Apr. 25, 1989)

A contract modification resulting in a deductive change to a firm, fixed-price contract is priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government. Thus, where two Government-leased helicopters, each having its own mechanic, are subsequently based at the same location, the Government may not simply unilaterally eliminate one mechanic by contract modification and commensurate deduction, and require the other mechanic to maintain both helicopters, regardless of the fact that the contractor may still have to pay the eliminated mechanic.

Appeal of Temsco Helicopters, Inc., IBCA-2594-A, 2595-A  
(May 3, 1989)

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Modification\_of Contracts--ContinuedDuress

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959  
(July 31, 1985) 92 I.D. 350

Notices

Formal written notice given after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer, where the evidence shows that the Government had actual knowledge of the operative facts relating to the contractor's claim and no showing was made that any prejudice to the Government had resulted from the belated written notice.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Notices--Continued

accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

A claim for overrun costs under a purchase order calling for the fabrication and installation of highway signs is denied when the appellant fails to show (i) that any work performed was in excess of that required by the contract; (ii) that timely notice of an impending overrun could not have been given if its accounting system had been adequate; and (iii) that

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Notices--Continued

the contracting officer was chargeable with constructive knowledge of the impending overrun.

Appeal of State of Alabama Highway Dept., IBCA-2362 (Dec. 10, 1987)

Payments

Where under a construction contract for the installation of water meters, meter boxes, and service lines, it is determined by the contemporaneous conduct of the parties during performance of work that the contract specifications did not require the contractor to replace all existing service lines in order to fully perform under the contract, the Government was found to be without justification to invoke the unit price schedule in the bid form to reduce the total contract price for quantities of existing pipe not replaced by the contractor.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985) 92 I.D. 195

A payment in excess of the contract value after a decision by the contracting officer not to fund an overrun is found to be an erroneous payment which may be recovered by the Government.

Appeal of Decision Science Consortium, Inc., IBCA-1651-2-83 (Sept. 6, 1985) 92 I.D. 372

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Payments--Continued

A dispute between the parties as to whether appellant has been paid the unit prices shown in a unilateral change order for the excavation of timber cribbing and the placement of compacted backfill is resolved by the Board finding that payment is an affirmative defense and that the Government has failed to carry its burden of showing that payment of the disputed sums were in fact made in this case.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of procurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where, under an Automatic Data Processing contract, the Government failed to secure either a Delegation of Procurement Authority from the General Services Administration, or obtain other Departmental authority prior to the issuance of numerous contract modifications, and the contract contained possible illegal provisions, the contractor was nevertheless entitled to recover wrongfully withheld progress payments on a quantum meruit basis. The Board found that the contractor had conferred a benefit on the Government which it had accepted, and the progress payments due appellant represented the reasonable value of such benefits.

A contractor had no legal basis on which to recover interest claimed for financing during the



CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Payments--Continued

period of time progress payments were wrongfully withheld by the Government. The contract's Price Adjustment clause incorporated into the contract Sec. 1-15.205-17 of the Federal Procurement Regulations which forbids the payment of interest on financing, however represented.

Appeal of Integral Biomedical Engineering, Inc.,  
IBCA-2069 (Feb. 22, 1988)

Subcontractors\_and\_Suppliers

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831  
(Mar. 26, 1985) 92 I.D. 146

Where a contractor is notified by a subcontractor after the primary contract is let that the subcontractor has made a unilateral pricing mistake and cannot perform its work without additional compensation, and the contractor voluntarily pays a substantial part of the additional compensation, such costs must be borne by the contractor and not by the Government, unless the Government had reason to be aware of the subcontractor's mistake before the contract was let.

Where a successful bidder on a firm fixed-price construction contract unqualifiedly agrees, before the contract is let, to extend the time for the Government's acceptance of its bid and, after the contract is let, encounters unanticipated price increases by its intended suppliers, the Government is not liable for the cost of the increases since it is entitled to

CONTRACTS--Continued

## CONSTRUCTION AND OPERATION--Continued

Subcontractors\_and\_Suppliers--Continued

rely on the contractor's original bid, and the contractor could have protected itself against such increases through previous arrangements with its suppliers.

Appeal of Kitchens Construction, Inc., IBCA-2140 et al.  
(July 16, 1986)

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Where a subcontractor, at the time it bid on the task of embedding pump casings in concrete, had no reason to anticipate the existence of obstructions, created by a previous subcontractor, that would interfere with its concrete pour, and thus incurred additional costs for labor and materials in performing the work, it was entitled to compensation for the unanticipated costs.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al.  
(Oct. 14, 1986)

Waiver\_and\_Estoppel

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the

CONTRACTS--ContinuedCONSTRUCTION AND OPERATION--ContinuedWaiver\_and\_Estoppe1--Continued

action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Upon finding that the contracting officer issued a change order granting a 27-day extension of time, which specifically included 3 days of delay caused by the cleaning up of rainwater damage resulting from roof leaks, and that the contracting officer based his change order on a determination that the contractor's request for the days of delay was "fair and reasonable," the Board holds that the Government waived its right to terminate the contract on the ground that the contractor breached the contract by not providing adequate protection to the building from rain damage during a reroofing project.

Appeal of James W. Sprayberry Construction, IBCA-2130 (Mar. 6, 1987) 94 I.D. 45

CONTRACT DISPUTES ACT OF 1978Generally

Consistent with its prior decisions, the Board refuses to adopt a narrow or purely technical view of the claim certification requirement of the Contract Disputes Act, concluding that the purpose of the requirement was to avoid or reduce frivolous claims, not to impose purely mechanical requirements on the contract disputes process. Accordingly, it rejects the notion that a contractor's certification in the prescribed format becomes inefficacious merely because it incorporates by reference an adequate previous submission of claim documents and computations which lacked only the necessary certification in order to become a valid CDA claim.

The granting by the Board of a motion for dismissal or for summary judgment made by one party requires only that the Board assume the truth of the

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedGenerally--Continued

facts being asserted by the other party. It does not require that the Board accept either the theory of the case or the statement of the law being urged by that party. Nor, in the case of an affidavit, is the Board bound to assume that the facts as alleged by the affiant are true when there is substantial evidence to the contrary and the affiant's assertions are merely conclusory.

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989) 96 I.D. 434



CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedAttorney\_Fees

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees), IBCA-2132-F (Oct. 8, 1987)

The Government's position in contesting a contractor's claim for interest on a disputed construction claim paid pursuant to a settlement agreement was not substantially justified where: (1) the contracting officer ultimately paid the entire amount of the contractor's claim except for interest; (2) the contracting officer's decision denying entitlement to interest on the basis of noncertification was legally in error; (3) the contracting officer's affidavit that he thought interest was included in the settlement

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedAttorney\_Fees--Continued

agreement had an insufficient basis and was patently inconsistent with other documents in the record; and (4) the appeal file compiled by the contracting officer inexplicably failed to include numerous documents that were essential to the proper resolution of the dispute between the parties, thereby giving rise to questionable assertions by counsel.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989) 96 I.D. 280

The Government's position is found not to be substantially justified in a case involving a contract partially terminated for the Government's convenience, where the Board finds (i) that there was no constancy in the Government's estimate of the costs to complete the terminated portion of the contract; (ii) that at the contracting officer level and in litigation the Government ignored the distinction between what might be considered a fair profit under a competitively bid contract terminated for the Government's convenience and what would be a fair profit if a negotiated contract is so terminated; and (iii) that in determining what a fair profit should be the contracting officer largely ignored the factors set forth in FAR 49.202(b).

Quality Seeding, Inc. (Application for Attorney Fees), IBCA-2552-F (Nov. 17, 1989) 96 I.D. 473



CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedBurden of Proof

An "act of God" is a natural event causing adverse economic consequences that, because of its rarity, time intensity, magnitude, location, duration, and/or time of occurrence, was not reasonably foreseeable. An act of God requires something more than an ordinary natural occurrence at the time and place involved, and its adverse consequences must not be primarily attributable to anyone's negligence.

Where a construction contractor's site was damaged by water runoff from another contractor's construction site (1) in the context of a general rainstorm exceeding the 100-year level; (2) where even the finished overall project as designed would not be protected beyond the 100-year storm level; (3) where damage to the first contractor's site probably would have occurred even if the second contractor were not contributorily negligent; (4) where the second contractor was not proved to be negligent in its construction methods under the circumstances; and (5) where there is evidence that the first contractor was at least as negligent as the second contractor may have been in causing the damage, the rainstorm was an act of God, and the first contractor is not entitled to recover its clean-up costs; and if the Government chooses to indemnify the first contractor for these costs, it does so as a volunteer and not because it was liable for such costs under SF 23-A.

Appeal of Peter Kiewit Sons' Co., IBCA-1789 (Dec. 14, 1989) 96 I.D. 487

Interest

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedInterest--Continued

subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986) 93 I.D. 131

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.D. 250

On the basis of the legislative history of the Contract Disputes Act and controlling case law, the Board rejects the notion that interest is payable on contractor claims only when an underlying dispute exists, but concludes that something more than a simple invoice and the passage of time is required for interest to accrue on contract obligations. The claim must be a demand for payment in a specific amount, and the CO must be given an adequate basis for making a decision.

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedInterest--Continued

"claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Interest, on contractor claims ultimately allowed, accrues from the date, subsequent to the date of the initial billing, when the CO receives a clear and unequivocal demand in writing for a specific amount that sets forth an adequate basis for the amount sought, provided that the CO has previously had a reasonable opportunity to act on the initial billing.

Appeal of A & J Construction Co., Inc., IBCA-2269  
(June 29, 1987) 94 I.D. 211

Consistent with its prior decisions, the Board refuses to adopt a narrow or purely technical view of the claim certification requirement of the Contract Disputes Act, concluding that the purpose of the requirement was to avoid or reduce frivolous claims, not to impose purely mechanical requirements on the contract disputes process. Accordingly, it rejects the notion that a contractor's certification in the prescribed format becomes inefficacious merely because it incorporates by reference an adequate previous submission of claim documents and computations which lacked only the necessary certification in order to become a valid CDA claim.

The granting by the Board of a motion for dismissal or for summary judgment made by one party requires only that the Board assume the truth of the facts being asserted by the other party. It does not require that the Board accept either the theory of the case or the statement of the law being urged by that party. Nor, in the case of an affidavit, is the Board bound to assume that the facts as alleged by the affiant are true when there is substantial evidence to the contrary and the affiant's assertions are merely conclusory.

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedInterest--Continued

entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

A contractor had no legal basis on which to recover interest claimed for financing during the period of time progress payments were wrongfully withheld by the Government. The contract's Price Adjustment clause incorporated into the contract Sec. 1-15.205-17 of the Federal Procurement Regulations which forbids the payment of interest on financing, however represented.

Appeal of Integral Biomedical Engineering, Inc., IBCA-2069 (Feb. 22, 1988)

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PPA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

Appeal of Columbia Engineering Corp., IBCA-2351 & 2352 (Mar. 7, 1988) 95 I.D. 35

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedInterest--Continued

The Board finds there is no statutory entitlement to interest on amounts claimed due under proposals for adjustment of the contract price under the Prompt Payment Act because under the circumstances, despite long delays before the proposals were incorporated into the contract, there were no proper invoices or required payment dates as specified in the Prompt Payment Act, and the proposals never became claims within the meaning of the Contract Disputes Act.

Appeal of Columbia Engineering Corp., IBCA-2322  
(Apr. 21, 1989)

Under the Prompt Payment Act no interest is payable on an agreed upon equitable adjustment for a change until a modification reflecting the agreement between the parties has increased the contract price, since prior to that time there was neither a proper invoice nor a required payment date as specified in the Prompt Payment Act.

A claim for interest under the Contract Disputes Act from the date a certified request for an equitable adjustment is received is denied, where the Board finds (i) that the letter containing the certification was an invitation to the Government to negotiate on the amount of equitable adjustment to be provided; (ii) that the letter did not constitute "a written demand" by the contractor, "seeking, as a matter of right, the payment of money in a sum certain"; and (iii) that the letter did not constitute the submission of a claim to the contracting officer for a decision on which interest would be payable from the date of receipt to the payment thereof.

Appeal of D. H. Blattner & Sons, Inc., IBCA-2589, 2463  
(Sept. 18, 1989) 96 I.D. 400

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedJurisdiction

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a contracting officer's final decision is dismissed as untimely.

Appeal of William Cargile Contractor, Inc., IBCA-1787-3-84 (Jan. 8, 1985) 92 I.D. 53

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impasse, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D. 255



CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedJurisdiction--Continued

Where a purported certification included only one of the three assertions required by 41 U.S.C. § 605(c)(1), the Board held the attempted certification to be improper and that it had no jurisdiction to consider the claims involved.

Appeals of Whitesell-Green, Inc., IBCA-1927 - 1940  
(June 13, 1985) 92 I.D. 263

A monetary claim by the Government against a contractor for its failure to furnish a registered professional soil engineer is sustained in part where the Board finds (i) that the contractor had reasonably interpreted the contract as requiring the services of the soils engineer for 7 weeks rather than for 9 months as contended by the Government; (ii) that the evidence offered by the appellant failed to show that the COR purported to waive the contract requirements pertaining to the soils engineer or that he was empowered to do so; (iii) that from the testimony offered by the COR it was inferred that he considered the man proposed by the contractor as a qualified soils engineer to be a competent soils technician; (iv) that it was as a soils technician that the COR approved having the contractor place the soils man on the payroll; and (v) that the action of the COR in approving the employment by the contractor of a soils technician was an informal accommodation between the parties and as such was within the authority of the COR.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedJurisdiction--Continued

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 136

A Government motion to dismiss an appeal for lack of jurisdiction on the ground that the contractor had failed to certify the claim to the contracting officer as required by the Contract Disputes Act is denied where the Board finds that after the appeal was taken appellant did substantially comply with the requirements of the Act by certifying the claim in the manner required and presenting the claim so certified to the contracting officer in the course of settlement discussions who advised appellant that it was only entitled to the amount found to be due in the decision previously rendered on the uncertified claim. Interest on any amount determined to be due appellant on its claims is to be computed from the date the claims were found to have been properly certified to the contracting officer.

Appeal of Salisbury & Dietz, Inc., IBCA-2090 (June 20, 1986) 93 I.D. 250

CONTRACTS--Continued

## CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

Where a contractor files a notice of appeal with the Board, from a decision of a contracting officer terminating the contract for default, more than a year after the decision was received by the contractor, the Board holds that the appeal is not within its jurisdiction to consider because of failure to comply with the 90-day rule for filing appeals to Boards of Contract Appeals, as provided in sec. 7 of the Contract Disputes Act of 1978.

Appeal of C. G. Norton Co., Inc., IBCA-2068 (June 24, 1986)  
93 I.D. 254

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not

CONTRACTS--Continued

## CONTRACT DISPUTES ACT OF 1978--Continued

Jurisdiction--Continued

maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of BlueLine Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

Claims presented for the first time in the Complaint are dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Integral Biomedical Engineering, Inc., IBCA-2069 (Feb. 22, 1988)

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PPA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedJurisdiction--Continued

and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

Appeal of Columbia Engineering Corp., IBCA-2351 & 2352 (Mar. 7, 1988) 95 I.D. 35

Substantial compliance with the certification requirement of the Contract Disputes Act is jurisdictional, and the Board has no authority to waive it. Substantial compliance is not found (1) where the required certification of a corporation was executed by a person who was neither a general officer nor an onsite project manager of the corporation, and (2) in the case of a joint venture, where the required certification was signed by a person who was not formally established as an agent of the joint venture in an equivalent capacity.

Appeal of Ball, Ball, & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-2103 & 2350 (June 6, 1988) 95 I.D. 81

A Government motion to dismiss an appeal for lack of jurisdiction over the claims asserted is denied where the Board finds on the basis of controlling precedents that under the Contract Disputes Act the Board has jurisdiction over an appeal from a default termination absent a monetary claim by the parties and that it is not precluded from exercising jurisdiction over such an appeal by the failure of the contracting officer to issue a requested final decision where the record shows that the contracting officer gave de facto consideration to the claims and in effect denied them.

Appeal of Philomath Timber Co., IBCA-2409 (Dec. 12, 1988) 95 I.D. 257

CONTRACTS--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedJurisdiction--Continued

A concession contract entered into by NPS is a procurement contract subject to the Contract Disputes Act, since it is for services that the Government itself would otherwise provide, and no statutory exemption from the Act or exclusionary intent by Congress is evident.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989) 96 I.D. 148

Since the Board does not maintain a suspense docket, a contractor's claims for additional compensation are dismissed without prejudice where parties have stipulated that the Government would take no corrective action on the road involved in the dispute until spring. Also dismissed without prejudice is a Government counterclaim which is found not to be within the present jurisdiction of the Board where the contracting officer's failure to advise the contractor of the Government's claim and to afford the contractor an opportunity to respond to the same before proceeding with the issuance of his decision is determined to deprive the decision of finality.

Appeal of Blaze Construction Co., Inc., IBCA-2668-A (Dec. 14, 1989)

DISPUTES AND REMEDIESGenerally

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986) 93 I.D. 131



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedGenerally--Continued

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedGenerally--Continued

extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Bindhamton and Collins, expressly, rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

On the basis of the legislative history of the Contract Disputes Act and controlling case law, the Board rejects the notion that interest is payable on contractor claims only when an underlying dispute exists, but concludes that something more than a simple invoice and the passage of time is required for interest to accrue on contract obligations. The claim must be a demand for payment in a specific amount, and the CO must be given an adequate basis for making a decision.

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Generally--Continued

definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of "claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Interest, on contractor claims ultimately allowed, accrues from the date, subsequent to the date of the initial billing, when the CO receives a clear and unequivocal demand in writing for a specific amount that sets forth an adequate basis for the amount sought, provided that the CO has previously had a reasonable opportunity to act on the initial billing.

Appeal of A & J Construction Co., Inc., IBCA-2269  
(June 29, 1987) 94 I.D. 211

Consistent with its prior decisions, the Board refuses to adopt a narrow or purely technical view of the claim certification requirement of the Contract Disputes Act, concluding that the purpose of the requirement was to avoid or reduce frivolous claims, not to impose purely mechanical requirements on the contract disputes process. Accordingly, it rejects the notion that a contractor's certification in the prescribed format becomes inefficacious merely because it incorporates by reference an adequate previous submission of claim documents and computations which lacked only the necessary certification in order to become a valid CDA claim.

The granting by the Board of a motion for dismissal or for summary judgment made by one party requires only that the Board assume the truth of the facts being asserted by the other party. It does not require that the Board accept either the theory of the case or the statement of the law being urged by that party. Nor, in the case of an affidavit, is the Board bound to assume that the facts as alleged by the affiant

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Generally--Continued

are true when there is substantial evidence to the contrary and the affiant's assertions are merely conclusory.

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

The Board finds there is no statutory entitlement to interest on amounts claimed due under proposals for adjustment of the contract price under the Prompt Payment Act because under the circumstances, despite long delays before the proposals were incorporated into the contract, there were no proper invoices or required payment dates as specified in the Prompt Payment Act, and the proposals never became claims within the meaning of the Contract Disputes Act.

Appeal of Columbia Engineering Corp., IBCA-2322  
(Apr. 21, 1989)

Under the Prompt Payment Act no interest is payable on an agreed upon equitable adjustment for a change until a modification reflecting the agreement between the parties has increased the contract price, since prior to that time there was neither a proper invoice nor a required payment date as specified in the Prompt Payment Act.

A claim for interest under the Contract Disputes Act from the date a certified request for an equitable adjustment is received is denied, where the Board finds (i) that the letter containing the certification was an invitation to the Government to negotiate on the amount



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedGenerally--Continued

of equitable adjustment to be provided; (ii) that the letter did not constitute "a written demand" by the contractor, "seeking, as a matter of right, the payment of money in a sum certain"; and (iii) that the letter did not constitute the submission of a claim to the contracting officer for a decision on which interest would be payable from the date of receipt to the payment thereof.

Appeal of D. H. Blattner & Sons, Inc., IBCA-2589, 2463 (Sept. 18, 1989) 96 I.D. 400

Appeals

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impasse, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedAppeals--Continued

dismissed with prejudice as outside the purview of the Board's jurisdiction.

Appeals of Fort Mojave Indian Tribe of Arizona, California, & Nevada, IBCA-1968 - 1988 (June 7, 1985) 92 I.D. 255

A Government counterclaim is found not to be before the Board for decision where the failure of the contracting officer to advise the contractor of the Government claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of his decision was considered to deprive the decision of finality.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Consistent with its prior decisions, the Board refuses to adopt a narrow or purely technical view of the claim certification requirement of the Contract Disputes Act, concluding that the purpose of the requirement was to avoid or reduce frivolous claims, not to impose purely mechanical requirements on the contract disputes process. Accordingly, it rejects the notion that a contractor's certification in the prescribed format becomes ineffectual merely because it incorporates by reference an adequate previous submission of claim documents and computations which lacked only the necessary certification in order to become a valid CDA claim.

The granting by the Board of a motion for dismissal or for summary judgment made by one party requires only that the Board assume the truth of the facts being asserted by the other party. It does not require that the Board accept either the theory of the case or the statement of the law being urged by that party. Nor, in the case of an affidavit, is the Board bound to assume that the facts as alleged by the affiant



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedAppeals--Continued

are true when there is substantial evidence to the contrary and the affiant's assertions are merely conclusory.

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

A document gathering, compiling and restating items in evidence as supplemented by items not in evidence and developed through the use of assumptions based on items not in evidence or on faulty interpretations of items in evidence was ordered struck from the Government's post-hearing brief, because the record was closed and because the document presented additional matter which was not subject to cross-examination and rebuttal by the appellant.

Appeal of Quality Seeding, Inc., IBCA-2297 (Aug. 8, 1988) 95 I.D. 125

Burden of Proof

A contractor's claim for travel costs associated with an aborted trip to install computer software, was denied where the contractor failed to demonstrate that the alleged installation date had been confirmed by the Government, or that it otherwise established entitlement to such costs as alleged.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedBurden of Proof--Continued

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985) 92 I.D. 172

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of Proof--Continued

some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

A contractor's claim for an equitable adjustment based upon delays incurred as a result of the Government's application of alleged restrictive specifications, was denied where the Government made a prima facie showing that the specifications relating to dam construction equipment reasonably related to its needs, and the contractor failed to meet its burden that such requirements unduly restricted the use of commercially manufactured equipment or required the fabrication of special equipment to perform the work.

In-Line Construction, IBCA-1909 (Dec. 19, 1985)

Except for correction of a mathematical error in the contracting officer's decision, a contractor's claim for additional settlement costs under an architect-engineer contract terminated for the convenience of the Government is denied, where the appellant failed to show by a preponderance of the evidence that a sub-mission schedule contained in the contract should not be used in determining the amount of the termination settlement to which the contractor is entitled. The appellant also failed to substantiate the amount claimed as subcontractor settlement costs.

FKW, Inc., IBCA-1942 (Jan. 23, 1986)

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of Proof--Continued

information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of\_Proof--Continued

soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of\_Proof--Continued

to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedBurden\_of\_Proof--Continued

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2064 (Apr. 17, 1986)

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

A claim for an equitable adjustment was denied where a contractor, engaged in the construction of a pipe trench for the spillway portion of a dam project, failed to demonstrate that during the cleanup phase of the excavation work, that Government inspectors directed the contractor to overexcavate beyond the neat lines required by the contract, or that material loosened during such excavation was "unsuitable" within the meaning of the specifications, as to require further excavation and placement of backfill concrete. Rather, the evidence indicated that the majority of overexcavation at the site was the result of excavation procedures determined to be for the

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedBurden\_of\_Proof--Continued

convenience of the contractor, and thus, noncompensable under the terms of the contract.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract commences, the contractor's claim for the timber in addition to its costs and a reasonable profit on the work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1908 (Aug. 13, 1986)

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986) 93 I.D. 455

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of\_Proof--Continued

Upon finding that the contractor's refusal to proceed was a conditional, rather than an unconditional, manifestation of nonperformance, when the contractor remained at the site awaiting clarification or direction on how to proceed under technical specifications, the Board holds that the Government failed to sustain its burden of proving alleged abandonment by not proving words or conduct on the part of the contractor manifesting a positive, unequivocal, and unconditional intent not to perform the contract in any event or at any time.

Appeal of James W. Sprayberry Construction, IBCA-2130  
(Mar. 6, 1987) 94 I.D. 45

Where, in a reroofing project, the Board found that the contractor's measurements and calculations were corroborated and more meticulously done than were the Government's, the Board held that the contractor sustained its burden of proof by a preponderance of the evidence with respect to the claims involving reshingling and the application of a foam roofing system.

Appeal of Singleton Contracting Corp., IBCA-1838  
(June 29, 1987)

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of\_Proof--Continued

support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

A dispute between the parties as to whether appellant has been paid the unit prices shown in a unilateral change order for the excavation of timber cribbing and the placement of compacted backfill is resolved by the Board finding that payment is an affirmative defense and that the Government has failed to carry its burden of showing that payment of the disputed sums were in fact made in this case.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987)  
94 I.D. 221

A contractor's claim for an equitable adjustment, due to an alleged differing site condition encountered during the pile-driving portion of a residential construction project, was denied, under both a category I and category II claim, where the Board found that the contractor failed to prove what the alleged encountered subsurface condition was. The Board held that proof of subsurface conditions cannot be shown in the abstract, but must be established in the light of geological data and other relevant and probative evidence.

Appeal of Straub Construction Co., IBCA-2291-A (Aug. 19, 1987)

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Where, under a requirement, fixed-price contract for photographic materials and services to be furnished by the contractor to the Government, the contractor failed to deliver the first six purchase orders, the Board denied claimed entitlement to a conversion of a termination for default to a termination for convenience, since the contractor failed to produce any credible evidence in support of its allegations, and since the principal assertion of the right to such conversion, that the supplier for the contractor failed to perform, does not, as a matter of law, constitute excusable cause for delay.

Appeal of Logan Cartographic Services, IBCA-2287A (Aug. 26, 1987)

A contract for construction of a fish hatchery nursery facility was properly terminated for default where the evidence showed that the contractor's work contained numerous performance deficiencies; that the contractor failed to make required submittals; and failed to remedy such deficiencies within a reasonable cure period. The record contained no basis for concluding that the contractor's failure to perform was excusable. Under such circumstances, the Government was within its rights to terminate the contract for default.

A contractor's request for an equitable adjustment for additional contract time due to alleged unusually severe weather was denied, where the contractor failed to prove that rainfall at the project site was unusually heavy for the time and place at which it occurred, or that there was some nexus between the weather conditions encountered and the contractor's inability to perform in timely fashion.

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage claimed by the contractor in its initial submission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities,  
IBCA-2113 (Dec. 7, 1987)

Although oral modifications of Government contracts may be valid in some instances, such contract modifications normally must be reduced to writing; and they are generally not effective until the writing has been executed by both parties. There is no legal presumption that a valid settlement agreement has been entered into merely because the parties at a negotiation session generally arrive at a meeting of the minds, and the party asserting the existence of a purely oral contract modification bears a heavy burden of proof that a valid modification has occurred.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

Where a contractor seeks to prove that the actual site conditions varied from contract indications respecting the width and shape of sealant to be removed and replaced between concrete panels of an aqueduct system, and notice to the Government is given after the entire 600,000 feet of joints had been mechanically extruded to partially remove the old sealant, the evidence offered by appellant is found to be inadequate to show a comparison between actual and contract-indicated conditions necessary to prove the existence of a differing site condition.

Appeal of Mingus Constructors, Inc., IBCA-2117 (Feb. 9,  
1988) 95 I.D. 25

The Board rejected a contractor's contention that the Government was estopped to deny alleged representations of a contracting officer, where it was found that no credible evidence, other than the allegations made in an affidavit of the contractor's president, substantiated the contractor's claim that the contracting officer induced the contractor to ignore the notification requirements of the Limitation of Funds Clause, or to forego the negotiation of a more suitable rate structure for its indirect costs under the contract.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16,  
1988)

Where the Board found that the contractor: (1) failed to prove by a preponderance of the evidence, that the specifications regarding the cement mix for the concrete construction of fish hatchery raceways were defective; (2) had not complied with the concrete curing and protection specifications which required keeping freshly placed concrete from premature drying; and (3) as a result, failed to initially achieve a smooth form concrete finish as required by the contract, the claim of the contractor for the cost of a filler/sealer process, to ultimately accomplish the required smooth form concrete finish, was denied on the

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

ground that such process was corrective or remedial work and not extra work as alleged by the contractor.

Appeal of Speer Construction Co., Inc., IBCA-2164  
(May 24, 1988)

Where a contractor demonstrated that it had installed an integrated hoist-gate system for an aqueduct project strictly in accordance with the detailed drawings and specifications designed and furnished by the Government, and the system as installed would not meet the performance requirements of the contract, the Board held that the failure of the system was not due to any fault of the contractor but resulted from the defective design of the Government.

A contractor was found to be entitled to an equitable adjustment where it presented sufficient evidence that the Government's defective specifications were the cause of the additional work claimed.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

Claims of a contractor are denied for lack of proof where the claims alleged in the Complaint are not supported by the presentation of any supporting evidence or persuasive argument.

Appeal of Crystal Creek Construction, Inc., IBCA-2210 (Dec. 6, 1988)

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden of Proof--Continued

damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

Where the Government was able to demonstrate that a reclamation contractor failed to comply with the terms of its contract to stabilize a landslide on an abandoned minesite, or complete the work within the time specified, it was found to have met its burden of proving the facts of the contractor's default.

Where a contractor failed to demonstrate that its nonperformance of a contract was otherwise excusable, the Board found the termination of such contract for default to be proper.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989)  
96 I.D. 257

After thorough reconsideration and reanalysis of its original decision, pursuant to BECO's four specifications of error, the Board finds that it did not err as alleged; confirms its original decision; and concludes that the principal reasons for appellant's failure to achieve higher recovery for its claims on appeal were: (1) failure to articulate and define the terms of the prehearing quantum stipulation and (2) failure to adduce

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of Proof--Continued

specific and probative evidence of delays caused by the actions or omissions of the Government.

Appeal of BECO, Inc. (On Reconsideration), IBCA-1693 (July 18, 1989)

The Board denies all 10 remaining equitable adjustment claims of the contractor, on behalf of its mechanical subcontractor, after settlement, withdrawal, or dismissal of some 20 other claims, all arising out of the construction of a Marine Environmental Assessment Facility at the Environmental Protection Agency's Environmental Research Laboratory, Sabine Island, Gulf Breeze, Florida. The denials are based on the contractor's failure to sustain its burden of proof with respect to entitlement, quantum, or both, by application of fundamental legal tenets, including the following: that to prove a claim, a contractor has the burden of not only establishing entitlement by a preponderance of substantial evidence, but also of supporting the quantum aspect of the claim by substantial, probative, and reliable evidence; that mere allegations or restatements of the amount claimed do not constitute proof and do not sustain that burden; that, to prevail, a contractor must show a consideration between the alleged extra contract work and the costs claimed.

Appeals of Whitesell-Green, Inc., IBCA-1928 et al. (Aug. 21, 1989)

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Burden\_of Proof--Continued

the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989)  
96 I.D. 434

DamagesGenerally

A contractor under a timber sale contract was entitled to recover costs incurred for the purchase of commercial rock when it could be determined from the evidence: (1) the total cubic yards of rock purchased by the contractor; (2) the cost per cubic yard; and (3) that such costs were reasonable.

Theodore R. McNeeley d/b/a Ted McNeeley Logging, IBCA-1844 (Oct. 23, 1985)

Where the causative link between the Government's misfeasance and the contractor's damage has already been established, there is nothing innately inadmissible about estimate testimony presented to show the amount of that damage; the strict rule limiting the admissibility of estimate testimony applies only to those estimates offered to attempt to establish the causative link, not those offered to prove the amount of damage once the link has already independently been established.

Appeal of BECO, Inc., IBCA-1693-6-83 (Aug. 6, 1986)  
93 I.D. 323

A contractor is entitled to recover all of the reasonable costs that proximately result from Government conduct where that conduct delays and disrupts the performance of the contract over a lengthy period of time, where the effect of the delay and disruption is to force the contractor into idleness over that period, and where the motivation for that conduct is a perception, without any foundation in the contract,



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedGenerally--Continued

that the contractor has design responsibility for the project.

Appeal of Redondo Electric, IBCA-2020 (June 29, 1987)

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage claimed by the contractor in its initial submission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Dec. 7, 1987)CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedGenerally--Continued

In a termination for convenience case, where the contractor proved its cost to complete the terminated portion of the work, the record provided all of the figures necessary to determine the proper amount of profit to be included in the quantum; when the Board considered the profit factors set out in FAR 49.202 as the contract required in a termination for convenience, it found that the amounts proved entitled the contractor to an amount of profit consistent with the quantum amount requested and granted the appeal in that amount.

Appeal of Quality Seeding, Inc., IBCA-2297 (Aug. 8, 1988)  
95 I.D. 125

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner; was aware because of two prior concessioner failures of the hazards of a proposed winter operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water and sewer system in the near future, which was likely to disrupt the concessioner's operations for from 6 months to a year or more; but nevertheless approved the concessioner's contract without adequately disclosing or discussing these problems with the proposed concessioner prior to

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedGenerally--Continued

approval, the NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with the concessioner's efforts to carry out its service contract.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989)  
96 I.D. 148

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, arguendo, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

Appeal of Norris E. Dixon, IBCA-2581 (Sept. 25, 1989)  
96 I.D. 434

Actual Damages

The Board allows a contractor a portion of the mobilization costs claimed in a case where the contracting officer had previously found the contractor to have encountered a Category I differing site condition which caused delays in contract performance.

In-Line Construction, IBCA-1909 (Dec. 19, 1985)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedActual Damages--Continued

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

An NPS concessioner is not entitled to the award of lost profits where the alleged amount thereof is based on an inadequate period of operation and therefore is excessively speculative.

An NPS concessioner is not entitled to the award of consequential damages that may indirectly result from the forced sale of a residential property unrelated to the contract, even though the proceeds of such sale were subsequently used to prevent foreclosure on the concession property, because the loss on the sale of the unrelated property was too remote and indirect to have been reasonably anticipated by NPS at the time the concession contract was entered into.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989)  
96 I.D. 148

Liquidated Damages

When the Board found that a contractor was entitled to additional contract performance time as a result of Government-caused delays, it was not permissible to impose liquidated damages prior to the end of the additional period of performance which

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedLiquidated Damages--Continued

extended to the date of beneficial occupancy. The Government estimated that 5 percent of the contract work remained at beneficial occupancy, which made that event the equivalent of substantial completion. The Board follows the rule that liquidated damages may not be imposed after substantial completion so the entire amount of liquidated damages was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

The assessment of \$100 per day liquidated damages against a contractor terminated for default was found to be proper, where the evidence showed that such damages were computed in good faith, and were not inherently unreasonable or disproportionate to the actual damages suffered by the Government upon the contractor's default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedLiquidated Damages--Continued

An assessment of liquidated damages for delays in work completion is not sustained where the assessment is contested, where a justifiable extension of completion time is denied by the contracting officer for insufficiently specific reasons, where a preponderance of evidence shows that the work was substantially completed within the time extension anticipated, and where the Government has shown no injury as a result of the completion delay.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989)

Measurement

Where the contractor's proof on quantum stands largely unopposed, but consists largely of estimates and approximations, it may nevertheless establish the facts for which it is introduced to the extent that it is or can be tied to verifiable record events or is otherwise sufficiently detailed to dispel doubts about its accuracy; when such evidence fails to rise to such a level, then it may be disregarded or accorded no more probative weight than any other uncorroborated evidence of similar description; if no other persuasive evidence is introduced on the quantum issue, then the Board may use the jury verdict approach to determine the same.

Appeal of BECO, Inc., IBCA-1693-6-83 (Aug. 6, 1986)  
93 I.D. 323

The assessment of \$100 per day liquidated damages against a contractor terminated for default was found to be proper, where the evidence showed that such damages were computed in good faith, and were not inherently unreasonable or disproportionate to the actual damages suffered by the Government upon the contractor's default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedDamages--ContinuedMeasurement--Continued

Where an NPS concessioner was clearly damaged in its ability to operate its resort by the fact that NPS undertook the construction of a water and sewer project during its tenure, but the bases for ascertaining damages put forth by the concessioner were too remote and speculative for the Board to adopt, a determination of damages by jury verdict is appropriate.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989)  
96 I.D. 148

In the absence of proof that the Government actually paid excess procurement costs to complete a contract terminated for default, its claim against the defaulted contractor for such costs was denied.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989)  
96 I.D. 257

Equitable Adjustments

A contractor's claim for travel costs associated with an aborted trip to install computer software, was denied where the contractor failed to demonstrate that the alleged installation date had been confirmed by the Government, or that it otherwise established entitlement to such costs as alleged.

Geostat Systems, Inc., IBCA-1611-8-82 (Mar. 13, 1985)

Where a contractor presented evidence of actual costs incurred for extra work and materials under the contract, such costs were presumed to be reasonable and established a prima facie case of recovery, which the Government failed to rebut.

Appeal of Pat Wagner d.b.a. A-Plumbing Co., IBCA-1612-8-82 (May 14, 1985)  
92 I.D. 195

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedEquitable Adjustments--Continued

A revised claim for slab dowel cuttings is approved in the amount requested where the Board finds the estimated costs submitted by the subcontractor who performed the work to be more persuasive than the estimate submitted by the Government. Noted by the Board was the fact that none of the Government's estimates were based on observing the performance of the work and that an estimating guide employed by the Government only purported to cover one of the two elements necessarily involved in completing the work.

Appeals of 3A/Magnolia-J.V., IBCA-1885 & 1886 (June 28, 1985)  
92 I.D. 284

Costs incurred for additional amounts of grouting and concrete required to seal fractured rock encountered during installation of ground anchors during an emergency residential subsidence project, were not compensable because the specifications contained in the contract were not defective and the contractor was responsible for choosing suitable construction methods. The contractor claimed entitlement to an equitable adjustment for such additional work and costs on the grounds that: (1) it was not provided relative boring data prior to award in order to determine subsurface conditions; (2) that the specifications were defective in that there was insufficient time involved in the bidding process to conduct an adequate subsurface site investigation; (3) that it encountered unexpected rock fractures which resulted in overruns of concrete and grout; and (4) that such conditions necessitated extra work to conform to the requirements of the contract. However, the contractor failed to sustain its burden of proof that the Government withheld relevant boring information, and the evidence demonstrated that the excess costs incurred were not the result of any defect in the specifications but pertained to those aspects of the work for which the contractor bore responsibility.

Nicholson Construction Co., IBCA-1711-8-83 (Aug. 15, 1985)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedEquitable Adjustments--Continued

The Board holds that a constructive change occurred, entitling a timber sale purchaser to an equitable adjustment for unanticipated extra costs, upon finding: that a Government-owned aggregate stockpile, designated as a suitable source for road work required to be performed by the purchaser, proved to be inadequate; that the purchaser had relied on the availability of such source for his performance of the contract; and that it was reasonable for him, under the existing conditions, to then incur extra costs in order to obtain the necessary aggregate from a commercial pit.

A contractor under a timber sale contract was entitled to recover costs incurred for the purchase of commercial rock when it could be determined from the evidence: (1) the total cubic yards of rock purchased by the contractor; (2) the cost per cubic yard; and (3) that such costs were reasonable.

Theodore R. McNeeley d/b/a Ted McNeeley Logging, IBCA-1844 (Oct. 23, 1985)

The Board holds that an irrigation project contractor failed to prove its case for an equitable adjustment, either on the theory of defective specifications or constructive change, where the contract-blasting specifications authorized the Bureau of Reclamation to apply or modify, at its discretion, a maximum peak particle velocity limitation for blasting vibration and damage control. Finding that the specification was aimed at protecting an old wooden flume used to irrigate about 2,300 acres of valuable orchard lands, and that damage to the flume could easily have jeopardized the entire project objective and wasted thousands of construction cost dollars, the Board also holds, in the circumstances, that the Bureau of Reclamation did not abuse or unreasonably exercise its discretion by first imposing the restriction and later relaxing it when satisfied the flume would not be damaged.

Appeal of Copenhagen Utilities & Construction, Inc., IBCA-1829 (Oct. 25, 1985) 92 I.D. 525

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedEquitable Adjustments--Continued

A purchaser under a timber sale contract was entitled to be reimbursed for additional excess costs incurred, where upon instructions from the Government to perform end haul/clean up operations of debris, appellant was required to obtain additional equipment which was not listed as equipment required for the performance of the contract in a special provision. To the extent the contract provisions could be considered to be ambiguous, the interpretation placed upon the contract terms before the dispute arose was found to be controlling.

Theodore R. McNeeley d/b/a Ted McNeeley Logging, IBCA-1843 (Oct. 30, 1985)

A contractor's claim for an equitable adjustment based upon delays incurred as a result of the Government's application of alleged restrictive specifications, was denied where the Government made a prima facie showing that the specifications relating to dam construction equipment reasonably related to its needs, and the contractor failed to meet its burden that such requirements unduly restricted the use of commercially manufactured equipment or required the fabrication of special equipment to perform the work.

A contractor was found not to be eligible for an equitable adjustment based upon a Category I differing site condition, because the contract documents failed to offer any indications regarding site conditions, and thus, there was no basis upon which the contractor could have relied in preparing its bid.

Where the record indicates that the components contained in Government-designated borrow material were neither unusual, unknown or materially different from what the contractor should have expected, but rather allegedly contained an inordinate amount of moisture due to rain and snowfall, the contractor's claim for an equitable adjustment, based on a Category II differing site condition is denied, given the long-standing rule that weather conditions do not constitute a valid basis for a differing site conditions claim.

The Board allows a contractor a portion of the mobilization costs claimed in a case where the contracting officer had previously found the contractor to



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

have encountered a Category I differing site condition which caused delays in contract performance.

In-Line Construction, IBCA-1909 (Dec. 19, 1985)

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Where, in the context of a major contract for the procurement and standardization of computer equipment to serve a Federal agency and its clientele, a secondary Government contract is entered into to develop the software needed to chargeback computer user costs, and the secondary contractor is required to use a new Government computer installed by the major contractor but is given incorrect access information for its use and as a result incurs substantial additional programming costs before the error is discovered, the secondary contractor is entitled to compensation from the Government for the additional costs incurred since, in the absence of an express and adequate disclaimer, the Government under the Government-furnished property clause warrants that the equipment it makes available is suitable for immediate use as provided.

Indian Affiliates, Inc., IBCA-1861 (Feb. 18, 1986)

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 92

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

A contractor's claim for an equitable adjustment for work performed during construction of a canal siphon is denied, where the contractor failed to show that a conflict existed between the contract drawings and specifications with respect to the design grade and joint spacing of siphon piping, or that the Government directed the contractor to maintain the joint spacing of the pipe at the expense of maintaining the pipe grade requirement.

Appeal of Western Contracting Corp., IBCA-1961 (Mar. 6, 1986)

A contractor's claims for equitable adjustments because of alleged changes and differing site conditions are properly denied where the contractor offers little or no credible evidence beyond the unsupported assertions of the contractor's principal officer to justify making any adjustments other than already allowed by the contracting officer.

Bechtold Construction Co., Inc., IBCA-1660-3-83 et al. (Mar. 13, 1986)

Where the evidence established that a contractor incurred certain extra costs during excavation of the spillway trench portion of a dam project, the Board held, by the jury verdict approach, that appellant was entitled to a portion of such additional costs in the amount of \$32,500.

Appeal of Claterbos, Inc., IBCA-1726-9-83 (July 30, 1986)

A contractor was found not to be entitled to an equitable adjustment for additional costs of sand embankment material incurred when a Government-listed source upon which appellant had based its bid failed to produce material meeting the quality requirements of the contract. The contractor's reliance on the source for such material was based on its unreasonable interpretation of the contract specifications which ignored pertinent requirements, including: (1) that such material be "predominantly natural," (2) that it meet

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

a specific gravity of 2.60 minimum, and (3) that the contractor was responsible for the specific quality of materials contained in a list of Government-approved sources.

Appeal of Claterbos, Inc., IBCA-1786-3-84 (Aug. 20, 1986) 93 I.D. 358

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of procurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedEquitable Adjustments--Continued

Contractors performing work under a clearing contract were not entitled to an equitable adjustment for having encountered substantial quantities of rock outcroppings which required additional hand clearing, where a full, pre-bid site investigation would have disclosed the presence of such visible rock conditions. The contractors based their bid on partial investigations of the project area, and on statements by a Government inspector, which the Board held did not misrepresent conditions at the site. The contractors sought to excuse their failure to inspect the entire project area on the grounds that the terrain was difficult to traverse, was covered with briars, and infested with snakes. The Board concluded however, that such factors pointed to the difficulty of conducting a full-site investigation, but did not demonstrate that the area was inaccessible or impossible to inspect.

Appeal of Bo McAlister & Loyd Thompson, IBCA-2144  
(Nov. 30, 1987)

A contractor was found to be entitled to an equitable adjustment where it presented sufficient evidence that the Government's defective specifications were the cause of the additional work claimed.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedEquitable Adjustments--Continued

A contractor was found to be entitled to an equitable adjustment for excess costs allegedly incurred during performance of site restoration work, where it failed to show that the Government's technical project officer (TPO), who oversaw performance of the work, arbitrarily or capriciously withheld her approval of such work, or that any directive issued by the TPO exceeded industry standards or was beyond the scope of the contract requirements.

Appeal of Geo-Con, Inc., IBCA-2195, 2196 (Mar. 14, 1989)

A contract modification resulting in a deductive change to a firm, fixed-price contract is priced on the basis of its effect on the contractor, not on the basis of its apparent value to the Government. Thus, where two Government-leased helicopters, each having its own mechanic, are subsequently based at the same location, the Government may not simply unilaterally eliminate one mechanic by contract modification and commensurate deduction, and require the other mechanic to maintain both helicopters, regardless of the fact that the contractor may still have to pay the eliminated mechanic.

Appeal of Temsco Helicopters, Inc., IBCA-2594-A, 2595-A  
(May 3, 1989)

A contractor's claim for additional termination costs was not allowable where the evidence showed that but for the contractor's failure to comply with the specifications and its performance inefficiencies, such expenses would not have been incurred.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989)  
96 I.D. 257



CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedExtraordinary Remedies

Where, under an Automatic Data Processing contract, the Government failed to secure either a Delegation of Procurement Authority from the General Services Administration, or obtain other Departmental authority prior to the issuance of numerous contract modifications, and the contract contained possible illegal provisions, the contractor was nevertheless entitled to recover wrongfully withheld progress payments on a quantum meruit basis. The Board found that the contractor had conferred a benefit on the Government which it had accepted, and the progress payments due appellant represented the reasonable value of such benefits.

Appeal of Integral Biomedical Engineering, Inc., IBCA-2069 (Feb. 22, 1988)

Jurisdiction

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions, the contracting officer failed to schedule audit responses as promised, the purported decision prevented discussions of the parties to reach an impasse, and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

Appeals of Husky Oil NPR Operations, Inc., IBCA-1871 et al. (Feb. 15, 1985) 92 I.D. 91

A claim presented for the first time in the Complaint is dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedJurisdiction--Continued

In a case where an Indian tribe moves to dismiss appeals for lack of jurisdiction in the Board where the Government claims for repayment of disallowed costs under cost-reimbursement contracts, the Board finds the Contract Disputes Act of 1978 to be inapplicable to contracts awarded under Public Law 93-638, but finds the Board has jurisdiction under a delegation of authority from the Secretary and the agreement of the parties under a disputes clause in the contracts. The claim of sovereign immunity by the tribe is found to relate to enforcement of any decision finding the tribe liable to the Government, and does not affect Board jurisdiction over the claims.

Appeals of Papago Indian Tribe of Arizona, IBCA-1962 & 1966 (Mar. 17, 1986) 93 I.D. 136

A Government counterclaim is found not to be before the Board for decision where the failure of the contracting officer to advise the contractor of the Government claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of his decision was considered to deprive the decision of finality.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Claims presented for the first time in the Complaint are dismissed since under the Contract Disputes Act of 1978 the presentation of a claim to the contracting officer for decision is a prerequisite to the Board exercising its appellate jurisdiction.

Appeal of Integral Biomedical Engineering, Inc., IBCA-2069 (Feb. 22, 1988)

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedJurisdiction--Continued

Where a contracting officer voluntarily withholds a clearly excessive amount from a construction contractor's final disbursement in order to provide adequate funds for alleged Davis-Bacon wage underpayments, and the contractor subsequently files a claim under the Contract Disputes Act to recover both the principal and the Prompt Payment Act interest involved, the contractor is entitled to CDA interest from the date of the claim as to both principal and PPA interest on the amount of the excessive withholding, even though the CO was in good faith at the time of the withholding and had no way of knowing, prior to the Labor Department's investigation, that the amount he had withheld was excessive.

Appeal of Columbia Engineering Corp., IBCA-2351 & 2352  
(Mar. 7, 1988) 95 I.D. 35

Substantial compliance with the certification requirement of the Contract Disputes Act is jurisdictional, and the Board has no authority to waive it. Substantial compliance is not found (1) where the required certification of a corporation was executed by a person who was neither a general officer nor an onsite project manager of the corporation, and (2) in the case of a joint venture, where the required certification was signed by a person who was not formally established as an agent of the joint venture in an equivalent capacity.

Appeal of Ball, Ball, & Brosamer, Inc., & Ball & Brosamer (JV), IBCA-2103 & 2350 (June 6, 1988)  
95 I.D. 81

Since the Board does not maintain a suspense docket, a contractor's claims for additional compensation are dismissed without prejudice where parties have stipulated that the Government would take no corrective action on the road involved in the dispute until spring. Also dismissed without prejudice is a Government counterclaim which is found not to be within the present jurisdiction of the Board where the contracting officer's failure to advise the contractor of the Government's claim and to afford the contractor an opportunity to respond to the same before proceeding

CONTRACTS--ContinuedDISPUTES AND REMEDIES--ContinuedJurisdiction--Continued

with the issuance of his decision is determined to deprive the decision of finality.

Appeal of Blaze Construction Co., Inc., IBCA-2668-A  
(Dec. 14, 1989)

Substantial Evidence

Where, in the context of a \$26 million construction contract, a contractor interprets a brand-name-or-equal clause for check valves to permit the substitution of valves it considers to be functionally equivalent to those specified, and requests the Government's approval of such substitution, but the request is denied without consistent or accurate reasons, and the contractor on appeal shows by substantial evidence that its proposed substitute valves meet or exceed the requirements that the Government considered essential at the time the contract was entered into, the contractor is entitled to the difference in costs between the valves it intended to use and those insisted upon by the Government.

Brinderson Corp., IBCA-1814 (Jan. 31, 1986)

Where a rock-quarry blasting contractor claims equipment damage and work delays caused by the detonation of hidden explosives, and proves by credible testimony that at least some hidden explosives must have been left at the site by a previous contractor; but where the contractor's log makes only minimum mention of the secondary blast that caused the damage, and the contractor has not given the contracting officer timely written notice of the mishap or of the differing site condition that allegedly resulted, and can offer no reasonable basis other than the total-cost approach for establishing its resulting additional costs, the Board limits the amount of its award to the amount of loss and damage

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Substantial Evidence--Continued

claimed by the contractor in its initial sub-mission to the contracting officer.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Dec. 7, 1987)

The Board rejected a contractor's contention that the Government was estopped to deny alleged representations of a contracting officer, where it was found that no credible evidence, other than the allegations made in an affidavit of the contractor's president, substantiated the contractor's claim that the contracting officer induced the contractor to ignore the notification requirements of the Limitation of Funds Clause, or to forego the negotiation of a more suitable rate structure for its indirect costs under the contract.

Appeal of Amity Unlimited, Inc., IBCA-2203 (Mar. 16, 1988)

Termination for Convenience

When the Government properly terminates a contract for its convenience, the contractor is entitled only to proper settlement costs incurred thereafter; a contractor may not recover expenses incurred in continuing performance after receiving the notice of termination where the Government did not desire such continuation and where the contractor, in ignoring the termination notice, relied on a memorandum which: (1) was written by a Government official unconnected with administration of the contract; (2) was addressed to someone other than the contractor; and (3) was dated 2 months before the termination and acquired by the contractor 1 month after the termination.

Appeal of Development & Technical Associates, Inc., IBCA-1510-8-81 (Aug. 13, 1985) 92 I.D. 355

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

The Board finds that a final decision of the contracting officer issued to resolve a dispute over the method of closing out a large-cost reimbursement contract, had the effect of constructively terminating the contract for the convenience of the Government requiring allowability of incurred costs and settlement expenses to be determined pursuant to the termination for convenience clause and applicable FPR provisions.

Appeal of Husky Oil NPR Operations, Inc., IBCA-1792 (Nov. 20, 1985) 92 I.D. 589

Imposition of excess costs for a reprourement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the Devito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Maxima Corp., IBCA-1828 (Apr. 1, 1986) 93 I.D. 151



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

Where a contract clause is not ambiguous but merely unspecific in a particular respect, it must be construed in light of other provisions and the general purpose of the contract. If the contractor urges an interpretation inconsistent with that general purpose, it has the burden of proving that its interpretation is what the parties intended.

Where a standard contract clause in a road construction contract provides that all merchantable timber in the clearing area shall become the property of the contractor, but the Government terminates the contract for its convenience shortly after the contract commences, the contractor's claim for the timber in addition to its costs and a reasonable profit on the work completed, on the theory that title to the timber had vested in it at the inception of the contract, is without merit. It is entitled only to what the termination for convenience clause contemplates, since that clause governs.

Appeal of North Central Construction, Inc., IBCA-1908  
(Aug. 13, 1986)

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

Where a prolonged period of unavailability of a contractor-furnished airplane, the subject of the contract, was the basis for a default termination and it was shown that the cause of that portion of the period which prompted the contracting officer to issue the termination notice was Government conduct and was beyond the control and without the fault and negligence of the contractor, the Board finds the delay relied upon for the default to be excusable with the result

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

that the default termination is converted into a termination for the convenience of the Government.

Appeal of Troy Air, Inc., IBCA-2238 (Nov. 3, 1987) 94 I.D. 416

Where a construction contractor, to assure compliance with the contract completion period, engages in planning and organizational activities prior to the actual performance period, the settlement process, under a subsequent termination for the convenience of the Government, requires reimbursement of the reasonable costs incurred by such contractor for such activities, as well as reimbursement of the reasonable costs incurred in preparing and supporting his settlement proposal. The contrary result would penalize the conscientious contractor and be out of harmony with contract clauses and regulations pertaining to terminations for the convenience of the Government.

Appeal of RHC Construction, IBCA-2083 (July 26, 1988) 95 I.D. 116

In a termination for convenience case, where the contractor proved its cost to complete the terminated portion of the work, the record provided all of the figures necessary to determine the proper amount of profit to be included in the quantum; when the Board considered the profit factors set out in FAR 49.202 as the contract required in a termination for convenience, it found that the amounts proved entitled the contractor to an amount of profit consistent with the quantum amount requested and granted the appeal in that amount.

Appeal of Quality Seeding, Inc., IBCA-2297 (Aug. 8, 1988) 95 I.D. 125

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Convenience--Continued

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Appeal of Lemire Contracting, IBCA-2549, 2550 (Apr. 17, 1989) 96 I.D. 189

Termination for DefaultGenerally

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985) 92 I.D. 340

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

Termination of a tree-thinning contract for default was held to be improper because the Government's failure to discharge its bid-verification responsibilities warranted rescission of the contract. The Board found that the actions of the parties constituted "mutual fault," where the contractor abandoned performance of the work in a case involving an admitted

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

mistake in judgment in bidding the contract, the contracting officer failed to request verification of the bid price in light of the wide range of bids received, and the disparity between the contract bid price and the Government's estimate for the work.

Appeal of Don Simpson, IBCA-2058 (Feb. 24, 1986) 93 I.D. 76

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

The Board holds a default termination to have been improper, and deems the termination to have been for the convenience of the Government, where the record shows that a suspension of work order had not been lifted and the contract completion time had not expired, at a time when the Government was issuing cure notices, and concurrently insisting that the contractor submit an unrequired proposal for approval of intended corrective measures.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 24, 1986)

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986) 93 I.D. 455

The Board holds a termination for default improper, as coming within the defective specifications or right to await clarification exception to the duty to proceed rule, upon finding that despite his many requests to do so, the Government project architect and contracting officer refused to clarify the technical method to be employed in installing roofing materials in order to comply with the specifications.

Appeal of James W. Sprayberry Construction, IBCA-2130 (Mar. 6, 1987) 94 I.D. 45

A tree-planting contract was properly terminated for default, where as of the effective date of termination, the contractor had completed only 8.7 percent of the contract work, while having used 53.3 percent of the contract performance period. The contractor's lack of diligence indicated that the Government could not be assured of timely completion of the contract, despite

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

its repeated warnings to the contractor about its lack of progress.

Appeal of Arthur L. Cruz, d.b.a. Cruz & Associates, IBCA-2098 (Sept. 10, 1987)

Where a contractor timely appeals a default termination by the Government and the Government subsequently assesses its excess procurement costs against the contractor, the Board decides, in light of the Fulford doctrine, that the entire matter has already been put before the Board by the contractor's original appeal, and that a second appeal is not necessary for the contractor to challenge the contracting officer's assessment of excess procurement costs, provided that the contractor expressly rebuts the CO's excess procurement-cost determination by evidence timely presented to the Board before the closing of the record in the case.

Appeal of Tom Warr, IBCA-2360 (Oct. 14, 1987) 94 I.D. 413

A contract for construction of a fish hatchery nursery facility was properly terminated for default where the evidence showed that the contractor's work contained numerous performance deficiencies; that the contractor failed to make required submittals; and failed to remedy such deficiencies within a reasonable cure period. The record contained no basis for concluding that the contractor's failure to perform was excusable. Under such circumstances, the Government was within its rights to terminate the contract for default.

Appeal of Davidson Enterprises, IBCA-1835 et al. (Nov. 3, 1987)



CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

Where a prolonged period of unavailability of a contractor-furnished airplane, the subject of the contract, was the basis for a default termination and it was shown that the cause of that portion of the period which prompted the contracting officer to issue the termination notice was Government conduct and was beyond the control and without the fault and negligence of the contractor, the Board finds the delay relied upon for the default to be excusable with the result that the default termination is converted into a termination for the convenience of the Government.

Appeal of Troy Air, Inc., IBCA-2238 (Nov. 3, 1987)  
94 I.D. 416

Where a contractor makes a written request for an increase in price based on a claim of a differing site condition, and 2 days after receipt by the contracting officer, re-delivers all Government-furnished fencing materials and insists on abandoning performance of the contract on the following day, the Board finds no evidence supporting the differing site condition and finds the termination for default to be proper.

Appeal of Harland Jones & R. Jackie Bowen (Contractors), IBCA-2444 (May 2, 1989)

Where a contractor completed less than 5 percent of a contract for construction of 13.5 miles of barbed wire fence before abandoning performance and later complained that he should have been allowed more time to obtain a bank loan, the contractor has stated no grounds for excusing his abandonment of the contract and the Board finds that the contract was properly terminated for default.

Appeal of Karl R. Kemp, IBCA-2488 (May 3, 1989)

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

Where the Government was able to demonstrate that a reclamation contractor failed to comply with the terms of its contract to stabilize a landslide on an abandoned minesite, or complete the work within the time specified, it was found to have met its burden of proving the facts of the contractor's default.

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

Where a contractor failed to demonstrate that its nonperformance of a contract was otherwise excusable, the Board found the termination of such contract for default to be proper.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989)  
96 I.D. 257

For a termination for default to be sustained on appeal, the Government's cure notice to the contractor must be clear, specific, and unambiguous; and the performance date imposed either must be set by mutual agreement of the parties, or if unilaterally established by the Government, must be reasonable. The burden of proof as to reasonableness is upon the Government.

Where the Government unilaterally issues to an aircraft contractor an ambiguous and garbled cure notice on the Friday before a Memorial Day weekend, with performance required by the Tuesday immediately after the Monday Memorial Day holiday, in circumstances in which the contractor has not concurred in the assigned completion date, the resulting default termination for

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedGenerally--Continued

failure to cure defects in accordance with the notice is unreasonable and will not be sustained.

Appeal of Central Air Service, Inc., IBCA-1827  
(Aug. 28, 1989)

Excess Costs

Imposition of excess costs for a reprourement depend on the validity of the default termination and where the Board found that the Government's attempt to reestablish a completion date was unreasonable pursuant to the DeVito rule, the termination for default was converted to a termination for convenience and the imposition of excess costs was rescinded.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987)  
94 I.D. 86

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedExcess Costs--Continued

Where a contractor timely appeals a default termination by the Government and the Government subsequently assesses its excess procurement costs against the contractor, the Board decides, in light of the Fulford doctrine, that the entire matter has already been put before the Board by the contractor's original appeal, and that a second appeal is not necessary for the contractor to challenge the contracting officer's assessment of excess procurement costs, provided that the contractor expressly rebuts the CO's excess procurement-cost determination by evidence timely presented to the Board before the closing of the record in the case.

Appeal of Tom Warr, IBCA-2360 (Oct. 14, 1987)  
94 I.D. 413

A contractor terminated for default was not entitled to recover additional excavation/backfill costs expended in attempting to comply with alleged defective specifications, where the evidence showed that the contractor made an inaccurate estimate of the amount of backfill required for the project, and failed to establish a cause-and-effect relationship between the alleged defective specifications and its excess costs.

A contractor's request for an equitable adjustment for excess costs associated with the purchase of pipe under a construction contract was denied, where the evidence showed that the contractor's interpretation of the phrase "install supply and drain piping using Government-furnished . . ." and contractor furnished pipe as required . . . was unreasonable, and did not justify the contractor's failure to make additional allowances for pipe in its bid. The Board concluded that a reasonable and prudent bidder would not interpret this and other contract provisions as meaning that all piping for the project would be furnished by the Government. Rather, the Board found that the only reasonable interpretation of the contract language, taken as a whole, would put the contractor on notice

CONTRACTS--Continued

## DISPUTES AND REMEDIES--Continued

Termination for Default--ContinuedExcess Costs--Continued

that it would be his responsibility to provide some of the piping for the project.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

In the absence of proof that the Government actually paid excess reprourement costs to complete a contract terminated for default, its claim against the defaulted contractor for such costs was denied.

Appeal of Scalf Engineering Co. & Pike County Construction Co. (A Joint Venture), IBCA-2328 (June 9, 1989)  
96 I.D. 257

## FEDERAL PROCUREMENT REGULATIONS

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify

CONTRACTS--Continued

## FEDERAL PROCUREMENT REGULATIONS--Continued

the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

The Board finds no fault with the definition of "claim" in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of "claim" recently set forth by the Federal Circuit Appeals Court in Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586 (Fed. Cir. 1987).

Appeal of A & J Construction Co., Inc., IBCA-2269  
(June 29, 1987)  
94 I.D. 211



CONTRACTS--ContinuedFEDERAL PROCUREMENT REGULATIONS--Continued

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

FORMATION AND VALIDITYGenerally

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general, and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedGenerally--Continued

to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

Where the apparent low bidder on a formally advertised paying contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

Authority to Make

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedAuthority to Make--Continued

Where a contractor executes a contract which cites as the authority for its issuance one of two possible statutory provisions authorizing the making of such contracts, and the contractor fails to show that the cited statutory provision is not a proper authorization for the type of contract at issue, the Board refused (1) to consider parol evidence, to read unstated provisions into the contract, (2) to consider for the same purpose the contractor's reliance on the Government's statements of policy when those statements do not rise to the level of law, and (3) to consider the contractor's evidence that it complied with the prerequisites for issuance of the contract under the alternate authority (which would provide the contractor with a more favorable system of cost reimbursement) as grounds for deeming the contract to be issued under that alternate authority after the parties agreed to issuance of the contract under the cited authority.

Appeal of Alamo Navajo School Board, Inc., IBCA-2123 et al. (Feb. 24, 1988)

Bid Award

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedBid Award--Continued

made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6, 1986) 93 I.D. 127

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of \$5 per acre was established by the advertised terms of sale, a bid for \$1.39 was properly rejected.

John R. Behrmann, 92 IBLA 64 (May 22, 1986)

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987) 94 I.D. 86

The Board has no authority to grant relief to a contractor whose subcontractor discovers a bid error after the contract has been awarded unless the circumstances surrounding the error satisfy the requirements of FAR provision 14.406-4(c).

A contracting officer is entitled to rely on a contractor's low bid where there is no apparent error in the bid submission and the bid is separated by only 7 and 11 percent, respectively, from the two next lowest bids out of eight bids submitted. Confirmation



CONTRACTS--Continued

## FORMATION AND VALIDITY--Continued

Bid Award--Continued

of bids is required only when (1) there is a substantial discrepancy between the sole responsive bid submitted and the Government's estimate, or (2) there appears to be some irregularity in the low bid or in the pattern of responsive bids.

Appeal of Edsall Construction Co., Inc., IBCA-2450  
(Aug. 28, 1989)

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286  
(Sept. 14, 1989)

Construction\_Contracts

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a

CONTRACTS--Continued

## FORMATION AND VALIDITY--Continued

Construction\_Contracts--Continued

utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing



CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedConstruction\_Contracts--Continued

the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefore, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedConstruction\_Contracts--Continued

being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

Fixed-price Contracts

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not

CONTRACTS--Continued

## FORMATION AND VALIDITY--Continued

Fixed-price Contracts--Continued

maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

Under the Permits and Responsibilities clause of a firm, fixed-price standard construction contract, the contractor is liable for a tax imposed by an Indian tribe on a construction project where the tribe alleges that the project is within reservation boundaries and the contractor elects to pay the tax rather than contest it. A Government contracting agency is not required to determine the boundaries of the Indian reservation before soliciting bids on the project.

Regardless of the precise location of the boundary of an Indian reservation, a construction contractor under a firm, fixed-price contract is not entitled to additional compensation where an Indian tribe, after the construction had commenced, imposed a tax on the project that the contractor had not anticipated when making its bid, in circumstances where the Government in its solicitation documents had called attention to the possibility that the tax might be imposed by the tribe.

Appeal of Humphrey Construction, Inc., IBCA-2266 & 2267 (June 11, 1987)  
94 I.D. 204

CONTRACTS--Continued

## FORMATION AND VALIDITY--Continued

Fixed-price Contracts--Continued

Where a contractor is aware prior to bidding that the electrical conduit portion of a fixed-price construction contract solicitation lacks a pay item for PVC-coated pipe, contrary to past agency practice, and the contractor is uncertain how the extra cost of the PVC-coated pipe will be allocated to contract cost, a patent ambiguity exists; and the contractor is bound to inquire into the matter rather than assuming that a change order will be issued to cover the additional costs. Where no inquiry was made, and the contracting officer subsequently declined to issue a change order, the contractor will be held to the amount of its fixed-price bid.

Appeal of Western States Construction Co., Inc., IBCA-2279 (June 20, 1988)

A contracting officer is not entitled to reduce the amount paid to a construction contractor under a competitive fixed-price contract by reason of state or local taxes the contractor was not required to pay. FAR provisions 48 CFR 52.229-3 by its terms requires adjustments only for post-contract changes in Federal taxes.

Appeal of Northwest Piping, Inc., IBCA-2611-A (May 3, 1989)

Governing Law

Under a guaranteed minimum quantity contract, where the Government failed to order the minimum quantities and the contractor agreed to extend the contract for 30 days without additional consideration on condition that a CPFF follow-on contract be negotiated, that payment be made for the minimum quantities, and that limited requirements be ordered during the 30-day extension, the Board finds that the extended contract was constructively terminated for convenience and that the payment for the minimum



CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedGoverning Law--Continued

quantities was outside the authority of the contracting officer and must be repaid to the Government as a mistaken payment.

Appeal of Maxima Corp., IBCA-1828 (Apr. 1, 1986)  
93 I.D. 151

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedGoverning Law--Continued

contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987)  
94 I.D. 21

Implied and Constructive Contracts

Where, under an Automatic Data Processing contract, the Government failed to secure either a Delegation of Procurement Authority from the General Services Administration, or obtain other Departmental authority prior to the issuance of numerous contract modifications, and the contract contained possible illegal provisions, the contractor was nevertheless entitled to recover wrongfully withheld progress payments on a quantum meruit basis. The Board found that the contractor had conferred a benefit on the Government which it had accepted, and the progress payments due appellant represented the reasonable value of such benefits.

Appeal of Integral Biomedical Engineering, Inc., IBCA-2069 (Feb. 22, 1988)

Mistakes

Where a contractor alleged that changed conditions resulted from a mutual mistake regarding geological conditions and that its costs increased due to encountering more severe caving conditions than anticipated at a test hole drill site, the Board found that the contract required remedial procedures to prevent caving when drilling in unconsolidated material and the contractor could not reasonably contend that caving conditions were not to be anticipated.

Appeal of Dy-Met, Inc., IBCA-1341 (Aug. 9, 1985)



CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedMistakes--Continued

Upon finding that a notice of award was signed by the contracting officer and mailed to the contractor on the same day that the contractor mailed a notice of mistake in bid, including a request to withdraw the bid, to the contracting officer; that both documents were received by the respective addressees on the same day, five days later; that the bid form provided for acceptance by mailing or otherwise furnished within a specified time; and that the contracting officer was in good faith accepting the bid and had no apparent reason to suspect that a bid mistake had been made; the Board holds: that the contractor has failed to sustain its burden of proof to establish entitlement to relief from the mistake, since the law is well settled that a notice of award is effective on the date mailed--if mailing is permitted by the bid document--constitutes an acceptance of an offer, and results in a binding contract; while a notice of mistake in bid and request for withdrawal constitutes an attempt to withdraw an offer to form a contract, or rescind a contract already made, and is not effective until received by the offeree--the contracting officer.

Singleton Contracting Corp., IBCA-1770-1-84 (Mar. 6 1986) 93 I.D. 127

A subcontractor ignores a clear reference to a payment provision in a statement of work provision at its peril; and where the reference to the payment provision was clearly erroneous, resulting in a patent ambiguity, the subcontractor had a duty to seek clarification of the payment provision before bidding.

Appeal of Newbery State, Inc., IBCA-1771-1-84 et al. (Oct. 14, 1986)

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wasteway, included in its solicitation and contract documents a photocopy of a general Federal Register wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with

CONTRACTS--ContinuedFORMATION AND VALIDITY--ContinuedMistakes--Continued

arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job-classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of Binghamton and Collins, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

Appeal of Blueline Excavating Co., IBCA-1990 (Feb. 24, 1987) 94 I.D. 21

Claims under a contract calling for cadastral survey work are denied where the appellant fails to establish it is entitled to additional compensation on the basis of mutual mistake, constructive change, or defective specifications.

Wakon Redbird & Associates, IBCA-1950 (July 30, 1987)

CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACTGenerally

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987)  
94 I.D. 101

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of

CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT--ContinuedGenerally--Continued

Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987)  
94 I.D. 120

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Costs allowable under contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act are only those authorized under the contract, regardless of the merits of the expenditures in other respects. Where the Government establishes a prima facie case that certain costs are unallowable under the literal terms of the contract, the burden is upon the contractor to prove allowability.

Where a contract entered into under the Indian Self-Determination and Education Assistance Act was specific in providing for advertising expenses only if they were "solely" for the recruitment of personnel, and a preponderance of the evidence indicated that a disallowed color brochure and video tape were intended for both teacher and student recruitment, the Board will not overturn the contracting officer's determination that the costs were unallowable.

Appeal of Rough Rock Demonstration School Board, Inc., IBCA-2373 (July 25, 1988)  
95 I.D. 97

CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT--ContinuedGenerally--Continued

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedures in 25 CFR Part 271.

Under 25 CFR 271.25 and 271.82, jurisdiction to review a declination to contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), rests with the Assistant Secretary--Indian Affairs. Declination to contract issues raised in an appeal pending before the Board of Indian Appeals are properly dismissed and referred to the Assistant Secretary.

The remedy for a violation of the time limits set forth in 25 CFR Part 271 for action by the Bureau of Indian Affairs on contract application filed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), as set forth in 25 CFR 271.28, is the right of an applicant to file an appeal with the next higher Bureau official as soon as the time limit has been exceeded.

The Tule River Indian Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 21 (Dec. 7, 1988)

Burden\_of Proof

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT--ContinuedBurden\_of Proof--Continued

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and, the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Costs allowable under contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act are only those authorized under the contract, regardless of the merits of the expenditures in other respects. Where the Government establishes a prima facie case that certain costs are unallowable under the literal terms of the contract, the burden is upon the contractor to prove allowability.

Where a contract entered into under the Indian Self-Determination and Education Assistance Act was specific in providing for advertising expenses only if they were "solely" for the recruitment of personnel, and a preponderance of the evidence indicated that a disallowed color brochure and video tape were intended for both teacher and student recruitment, the Board will not overturn the contracting officer's determination that the costs were unallowable.

Appeal of Rough Rock Demonstration School Board, Inc., IBCA-2373 (July 25, 1988) 95 I.D. 97

Contracting Officer

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later



CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--ContinuedContracting Officer--Continued

decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

Governing Law

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

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CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--ContinuedGoverning Law--Continued

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Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

Costs allowable under contracts entered into pursuant to the Indian Self-Determination and Education Assistance Act are only those authorized under the contract, regardless of the merits of the expenditures in other respects. Where the Government establishes a prima facie case that certain costs are unallowable under the literal terms of the contract, the burden is upon the contractor to prove allowability.

Where a contract entered into under the Indian Self-Determination and Education Assistance Act was specific in providing for advertising expenses only if they were "solely" for the recruitment of personnel, and a preponderance of the evidence indicated that a disallowed color brochure and video tape were intended for both teacher and student recruitment, the Board will not overturn the contracting officer's determination that the costs were unallowable.

Appeal of Rough Rock Demonstration School Board, Inc., IBCA-2373 (July 25, 1988) 95 I.D. 97

CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--ContinuedModification of Contracts

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CONTRACTS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--ContinuedRegulations

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Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987)  
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Appeal of Navajo Community College (On Reconsideration), IBCA-1834 (May 8, 1987)

PERFORMANCE OR DEFAULTGenerally

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Generally--Continued

from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Acceleration

What constitutes an order to accelerate in a case where the contractor's theory of recoverability is constructive acceleration should not be measured against a rigid standard, being a flexible notion to be determined on a case-by-case basis; what must be found before a conclusion of constructive acceleration is proper are circumstances which suggest a reasonable conclusion that the Government wanted the contract work accelerated and pressured the contractor to accelerate in fact. In a case where the contract required the contractor to perform at sea and provided that unusually poor weather constituted an excuse for delay, the Government's (1) insistence that the contractor remain at sea ready to perform whenever the weather provided even short periods of operable time, (2) unreasonable delay in responding to the contractor's request for extension because of bad weather, and (3) issuance of cure notices threatening default termination for allegedly untimely performance when the contractor's terms required an extension of the performance period for excusable weather-related delays, taken together, constitute the circumstances necessary to a conclusion of constructive acceleration.

Appeal of Intersea Research Corp., IBCA-1675 (Apr. 25, 1985)  
92 I.D. 157

Acceptance\_of Performance

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Acceptance\_of Performance--Continued

deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocurring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985)  
92 I.D. 63

A claim against a contractor for damages asserted under the Termination For Default--Damages For Delay--Time Extension Clause is sustained when the contractor failed or refused to complete the work covered by a mop-up and fireline services contract and the amount charged against the contractor for completion of the work remaining with Government forces represents a reasonable measure of the damages sustained by the Government as a result of the contractor's failure to complete the contract work.

Appeal of Champion Timberland Services, Inc., IBCA-2061 (Feb. 28, 1986)

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)



CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Acceptance\_of Performance--Continued

Since the Government has the burden of proof on appeal that it was justified in terminating a building maintenance contract for default, it also has the burden of proving the occurrence of the deficiencies in the provision of janitorial services that led up to the notification to the contractor of the proposed termination.

In the absence of any proof by a contracting officer that he notified a building maintenance contractor at the time they occurred of alleged janitorial deficiencies leading up to a termination of the contract for default, the contractor is entitled to payment for its services up until the date of the termination even if it does not challenge the default termination as such.

Appeal of Michigan Building Maintenance, Inc., IBCA-1945 (Dec. 5, 1986)  
93 I.D. 455

A contractor's claim for amounts allegedly owed under a progress payment, which was suspended due to unsatisfactory performance of the contract work was denied, where the evidence showed that such work was never accepted by the Government, and that the value of the work performed by the contractor was far outweighed by the costs of procurement to replace and repair the deficiencies of the contractor's performance. The Government was found to have received no benefit from appellant's efforts, and was therefore not required to pay for any labor and materials expended by the contractor in its unsuccessful attempt to complete the contract.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

Breach

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Breach--Continued

or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

Where the apparent low bidder on a formally advertised paying contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

Appeal of RACO Services, Inc., IBCA-2260 (Mar. 18, 1987)  
94 I.D. 86

A contractor's claim that it was entitled to damages due to the Government's alleged breach of contract, was denied where the evidence failed to support the contractor's allegations that the Government administered the contract in an arbitrary and capricious manner, and failed to allow the contractor an adequate opportunity to cure its performance deficiencies.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Compensable Delays

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Compensable Delays--Continued

Appellant's monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

Excusable Delays

What constitutes an order to accelerate in a case where the contractor's theory of recoverability is constructive acceleration should not be measured against a rigid standard, being a flexible notion to be determined on a case-by-case basis; what must be found before a conclusion of constructive acceleration is proper are circumstances which suggest a reasonable conclusion that the Government wanted the contract work accelerated and pressured the contractor to accelerate in fact. In a case where the contract required the contractor to perform at sea and provided that unusually poor weather constituted an excuse for delay, the Government's (1) insistence that the contractor remain at sea ready to perform whenever the weather provided even short periods of operable time,

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

(2) unreasonable delay in responding to the contractor's request for extension because of bad weather, and (3) issuance of cure notices threatening default termination for allegedly untimely performance when the contract's terms required an extension of the performance period for excusable weather-related delays, taken together, constitute the circumstances necessary to a conclusion of constructive acceleration.

Appeal of Intersea Research Corp., IBCA-1675 (Apr. 25, 1985)  
92 I.D. 157

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985)  
92 I.D. 340

Where a contractor sufficiently identified specific delays in the Government's responses to requests for change orders, the Board held that the contractor was entitled to a 337-day extension of the contract performance time even though there were other delays for which the Government and the contractor were concurrently responsible and other delays for which the contractor was solely responsible.

Appeal of Wickham Contracting Co., Inc., IBCA-1301-8-79 (Mar. 31, 1986)

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

Where the Government enters into a firm fixed-price contract for the construction of a fence that is to be completed within 25 days after the contractor's receipt of a notice to proceed, and 10-1/2 months elapse without performance in circumstances where the Government's repeated notices to proceed or to resume work are not picked up by the contractor from its post office box, the Government is justified in terminating the contract for default even though the contractor alleges illness or failure to receive the notices for a part of the period during which performance should have occurred.

Appeal of Security Fence Co., IBCA-2077 (Apr. 23, 1986)

A contractor's claim for additional compensation on the basis of changed site conditions will be denied where the sole basis for the claim is unanticipated costs allegedly incurred by the contractor as a result of a County decision to enforce existing vehicle weight restrictions that precluded the use of premixed concrete trucks on the only access road to the project site. It is immaterial whether the Government's own actions may have precipitated the County's enforcement decision. Liquidated damages are properly assessed when the contract provision authorizing their assessment is reasonable, and the contractor fails to show that the delay in the completion of the work arose from unforeseeable causes beyond its control and without fault or negligence on its part.

Appeal of Jack Morehouse d/b/a Morehouse Painting, IBCA-2087 (May 22, 1986)

Where the Government had specified a sole-source brand, and an off-standard tint, of top coating for the application of a foam roofing system, and the contractor's order for extra top coating, required because of Government underestimates, was delayed by the manufacturer and not controllable by the contractor, the Board held such delay excusable and determined the contractor entitled to a return of liquidated damages for 50 days. The Board also allowed 10.062 days of delay for the extra time required to reshingle and



CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

apply foam roofing for square footage over and above the Government's estimates for such items.

Appeal of Singleton Contracting Corp., IBCA-1838  
(June 29, 1987)

Where, under a requirement, fixed-price contract for photographic materials and services to be furnished by the contractor to the Government, the contractor failed to deliver the first six purchase orders, the Board denied entitlement to a conversion of a termination for default to a termination for convenience, since the contractor failed to produce any credible evidence in support of its allegations, and since the principal assertion of the right to such conversion, that the supplier for the contractor failed to perform, does not, as a matter of law, constitute excusable cause for delay.

Appeal of Logan Cartographic Services, IBCA-2287A  
(Aug. 26, 1987)

A contractor's request for an equitable adjustment for additional contract time due to alleged unusually severe weather was denied, where the contractor failed to prove that rainfall at the project site was unusually heavy for the time and place at which it occurred, or that there was some nexus between the weather conditions encountered and the contractor's inability to perform in timely fashion.

Appeal of Davidson Enterprises, IBCA-1835 et al.  
(Nov. 3, 1987)

Where a contractor completed less than 5 percent of a contract for construction of 13.5 miles of barbed wire fence before abandoning performance and later complained that he should have been allowed more time to obtain a bank loan, the contractor has stated no grounds for excusing his abandonment of the contract

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Excusable Delays--Continued

and the Board finds that the contract was properly terminated for default.

Appeal of Karl R. Kemp, IBCA-2488 (May 3, 1989)

Impossibility of Performance

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provided at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831  
(Mar. 26, 1985) 92 I.D. 146

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner; was aware because of two prior concessioner failures of the hazards of a proposed winter operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water and sewer system in the near future, which was likely to disrupt the concessioner's operations for from 6 months to a year or more; but nevertheless approved the concessioner's contract without adequately disclosing or discussing these problems with the proposed concessioner prior to approval, the NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Impossibility of Performance--Continued

the concessioner's efforts to carry out its service contract.

Appeal of R & R Enterprises, IBCA-2417 (Mar. 24, 1989)  
96 I.D. 148

Inspection

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocurring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985)  
92 I.D. 63

Mere allegations by a contractor that a BLM inspector ordered the performance of extra work in connection with a contract for the hand-piling of timber slash on Government forest lands are not sufficient to justify additional compensation where the Government inspector denies that he went beyond the contract specifications and the contractor offers no probative evidence in support of his allegations. The burden is on the contractor to timely notify the contracting officer of the alleged change in work requirements and to prove that the extra work being claimed was actually done.

Appeal of Dace Cochran, IBCA-1799 (May 23, 1986)

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Inspection--Continued

The Government was held to have wrongfully rejected hoist-gate gear motors furnished by a contractor for use on an aqueduct project, where for purposes of determining compliance with the technical specifications of the contract, the Government had employed improper output restrictions during the belated testing of such motors, and the evidence of record and the weight of expert testimony established that the motors when submitted met the requirements of the contract and of approved submittals.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

Appeal of Hal Allred, IBCA-2447-A (Feb. 16, 1989)  
96 I.D. 62

Release and Settlement

Where a contract settlement arrived at pursuant to a termination for the convenience of the Government expressly omits any provision for the payment of interest on the amount of the agreement, the contractor is entitled to interest on the settlement amount from the date of its certification of the claim until the date payment of the settlement amount is made, notwithstanding the provisions of 41 CFR 1-8.212-2(c) (1981) and subsequent similar provisions which preclude interest on normal termination settlements.

Power City Construction, Inc., IBCA-1839 (Mar. 12, 1986)  
93 I.D. 131

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Release and Settlement--Continued

A Government motion to dismiss a claim of differing site conditions is denied where the motion is based upon a purported accord and satisfaction attributed to the contractor accepting a change order and a supplement thereto but the Board notes that an accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord entitling appellant to an oral hearing as requested.

Appeal of T. Ferguson Construction, Inc., IBCA-2365  
(May 3, 1988)

Where the Board found that a contract modification representing the settlement of certain claims against the Government did not represent the final integrated expression of the parties' agreement as it pertained to other claims that were not being settled, it allowed the introduction of parol evidence to ascertain the true intent of the parties as to effect of the modification. The Board further found that parol evidence established a mutual agreement differing from that suggested by the modification. Thus, the contractor was not barred from asserting its subsequent claim on the grounds of alleged accord and satisfaction or payment and release.

Appeal of Gracon Corp., IBCA-2271 (Oct. 18, 1988)

Unspecific, standard release language in a contract modification is sufficient to dispose only of those matters to which it clearly relates and/or which were within the contemplation of the parties. A boilerplate claims release clause contained in a no-fault time-extension modification is not sufficient to release additional contractor cost claims that the parties have never considered.

Appeal of Middlesex Contractors & Riggers, Inc., IBCA-1964 (Feb. 8, 1989) 96 I.D. 31

CONTRACTS--Continued

## PERFORMANCE OR DEFAULT--Continued

Substantial Performance

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959  
(July 31, 1985) 92 I.D. 350

A Government purchase order is merely an offer to purchase and does not become a contract until accepted by the contractor. The burden is on the contractor to prove acceptance by substantial performance. Where a purchase order contemplates the immediate repair of an electric motor needed for ongoing construction, under emergency circumstances known to the repairer, acceptance consists in the actual performance of the needed repairs; and the Government is not liable for any labor or material costs incurred if the repairs are not timely or successfully performed and the Government derives no benefit from the unsuccessful repairer's efforts.

Appeal of J & C Electric Motor Service, IBCA-2064  
(Apr. 17, 1986)

Suspension of Work

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, de facto, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where



CONTRACTS--ContinuedPERFORMANCE OR DEFAULT--ContinuedSuspension\_of Work--Continued

the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a de facto stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

Appeal of Optimal Data Corp., IBCA-1695 (June 20, 1985) 92 I.D. 269

The Board holds a default termination to have been improper, and deems the termination to have been for the convenience of the Government, where the record shows that a suspension of work order had not been lifted and the contract completion time had not expired, at a time when the Government was issuing cure notices and concurrently insisting that the contractor submit an unrequired proposal for approval of intended corrective measures.

Appeal of Albemarle Asphalt, Inc., IBCA-1889 (July 24, 1986)

CONTRACTS--ContinuedPERFORMANCE OR DEFAULT--ContinuedSuspension\_of Work--Continued

Under a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the contracting officer suspended performance resulting in a 3-week delay to the contractor in order to comply with an unscheduled airworthiness inspection order, issued because of the crash of a similar C-119 aircraft in California, but having no relationship to the subject contract aircraft. The Board found that the Government failed to prove the contractor's aircraft to be unworthy; that the suspension of the work for the emergency inspection, although authorized under the contract, was for the convenience of the Government, not based on the fault or negligence of the contractor, and was for an unreasonable period. The Board concluded that the contractor was entitled to an equitable adjustment pursuant to the suspension clause and awarded the contractor lost availability payments and its extra inspection costs plus interest.

Appeal of Hawkins & Powers Aviation, Inc., IBCA-1608-8-82 (Sept. 4, 1986) 93 I.D. 384

RULES OF PRACTICEMotions

The Board denies a motion to dismiss by the Government based on the lack of a monetary claim certified by the contractor and presented to the contracting officer for decision because numerous Government monetary claims, not requiring certification are before the Board and because other appeals are also before the Board which involve the central issue of this appeal.

Appeal of Husky Oil NPR Operations, Inc., IBCA-1792 (Nov. 20, 1985) 92 I.D. 589

CONVEYANCESGENERALLY

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)  
92 I.D. 83

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The Department has continuing jurisdiction to consider all issues in claims to land while legal title remains in the United States. A Native allotment applicant obtains no legal title in land claimed by him prior to receipt of a "Native allotment."

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578

CONVEYANCES--ContinuedGENERALLY--Continued

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young

CONVEYANCES--ContinuedGENERALLY--Continued

as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuanguak, Mollie Itta, Wilber Ahtuanguak, 97 IBLA 261 (May 13, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987)  
94 I.D. 422

CONVEYANCES--ContinuedGENERALLY--Continued

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed, and gives the patentee the protection of a judicial forum.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988)  
95 I.D. 314

If a proper party lodged a timely protest of a Native allotment application filed pursuant to the Act of May 17, 1906, 34 Stat. 197, that application is removed from the automatic vesting provisions of ANILCA, and is adjudicated pursuant to the Act of May 17, 1906. If, after adjudication, BLM issues a decision holding the Native allotment application for approval, the adjudicatory process had been carried to the point of a BLM decision on the merits of the application. Having preserved his rights under sec. 905(a)(1) of ANILCA, the party is entitled to initiate a private contest upon receipt of notice of BLM's intent to grant the Native allotment.

When the decision holding the Native allotment application for approval also rejects a selection application filed pursuant to ANCSA, and affords the Native village corporation the opportunity to initiate



CONVEYANCES--ContinuedGENERALLY--Continued

a private contest, the Native village corporation has a choice regarding how to continue its objections to the approval of the Native allotment application. It may initiate a private contest or allow the decision to become final and appeal from that decision. If it elects to file a private contest, it is not required to pursue an appeal.

A conveyance to a Native corporation under ANSCA is subject to valid existing rights. A conflicting application based on settlement and occupancy maintained under laws leading to acquisition of title is properly excluded from an ANSCA conveyance.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

INTEREST CONVEYED

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)  
92 I.D. 83

RESERVATIONS

Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985)  
92 I.D. 578

CONVEYANCES--ContinuedRESERVATIONS--Continued

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time

CONVEYANCES--ContinuedRESERVATIONS--Continued

within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

RESERVATIONS AND EXCEPTIONS

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

COURTS

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a

COURTS--Continued

settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a first-form reclamation withdrawal, which segregated a tract from mineral entry thereby reinstating the terms of the withdrawal, a mining claim subsequently located on that tract is properly declared null and void ab initio.

George & Reda Howard, 104 IBLA 114 (Aug. 31, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim

COURTS--Continued

subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

DELEGATION OF AUTHORITY

(See also Administrative Authority, Contracts--if included in this Index.)

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

A presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) <sup>94 I.D. 132</sup>

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is

DELEGATION OF AUTHORITY--Continued

largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBLA 144 (June 21, 1989)

DESERT LAND ENTRYGENERALLY

Where on appeal from a decision rejecting a desert land entry application because the applicant has failed to show that appropriate steps have been taken to acquire a water right, the applicant subsequently clarifies his intent such that a sufficient water right might be available, the decision rejecting the application will be set aside and the case file will be remanded to permit reconsideration of the application.

Silvita S. Rousseau, 85 IBLA 46 (Feb. 5, 1985)



DESERT LAND ENTRY--ContinuedGENERALLY--Continued

In the absence of statutory authority, no "second entry" can be made under the Desert Land Act, 19 Stat. 377, 43 U.S.C. § 321 (1982). Under the regulation, 43 CFR 2521.1(b), right of desert land entry is exhausted by the making of an entry.

Paul W. Smith, 87 IBLA 247 (June 20, 1985)

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. James M. Mills, 91 IBLA 370 (Apr. 28, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Harlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

ANNUAL PROOF

A desert land entry is properly cancelled when the entryman fails to submit annual proof showing the requisite improvement of the entry during the first year of the life of the entry.

Fineas G. Hughbanks, 97 IBLA 250 (May 13, 1987)

DESERT LAND ENTRY--ContinuedAPPLICATIONS

In the absence of statutory authority, no "second entry" can be made under the Desert Land Act, 19 Stat. 377, 43 U.S.C. § 321 (1982). Under the regulation, 43 CFR 2521.1(b), right of desert land entry is exhausted by the making of an entry.

Paul W. Smith, 87 IBLA 247 (June 20, 1985)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Albert N. Smith et al., 87 IBLA 253 (June 20, 1985)

When, on the face of a desert land application, an applicant has indicated that he or she has proceeded as far as possible in obtaining a water right but has failed to document this fact in the application, it is error to reject the application under 43 CFR 2521.2(d) without first affording the applicant an opportunity to submit proof corroborating the assertions on the application.

Jean P. Walsh, 89 IBLA 311 (Nov. 12, 1985)

A desert land entry application is properly rejected when a conflicting application has shown sufficient evidence of a water right and has been allowed for entry for the same land. A desert land entry application is properly considered by BLM prior to a conflicting application where the record shows it was drawn with first priority in a drawing held July 30, 1979, consistent with 43 CFR 1821.2-3, pursuant to a notice published in the Federal Register opening the subject lands in Nevada to desert land filings.

Blaine Sharp, 89 IBLA 400 (Nov. 22, 1985)

DESERT LAND ENTRY--ContinuedAPPLICATIONS--Continued

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Harlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

BLM may properly reject a desert land entry application where, prior to classification of the lands sought and prior to the entry being allowed, the lands have been withdrawn by a public land order as part of the Snake River Birds of Prey Area.

Diane M. Jensen, Odell M. Smith, Jr., 97 IBLA 23 (Apr. 23, 1987)

Byron V. Anderson, 97 IBLA 105 (Apr. 29, 1987)

DESERT LAND ENTRY--ContinuedAPPLICATIONS--Continued

The Bureau of Land Management properly rejects a desert land application when the applicant proposes to irrigate his entry from underground water sources, but indicates on the face of the application that he has not taken appropriate steps, as far as then possible, toward the acquisition of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land described in the application.

A ruling by BLM that the jojoba plant does not meet the requirements of the desert land entry laws will not support rejection of a desert land entry application where the record does not indicate that BLM analyzed data submitted by the applicant showing the economic feasibility of the commercial cultivation of the jojoba plant.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a power-site classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and

DESERT LAND ENTRY--ContinuedAPPLICATIONS--Continued

thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

Where, on appeal from a BLM decision rejecting a desert land entry application because it is considered not economically feasible to farm the land sought, the applicant presents evidence contradicting crucial aspects of BLM's economic analysis, including the anticipated yield of a particular crop and the cost of securing electricity for a water pump, sufficient to raise questions of fact, the BLM decision will be set aside and the case referred for a hearing and subsequent decision by an Administrative Law Judge.

Frederick C. Tullis, Kathleen E. Tullis, 102 IBLA 215 (May 10, 1988)

The Board will set aside a BLM decision rejecting a desert land entry application based on a determination that the land applied for could not be economically farmed and will remand the case to BLM for readjudication where BLM failed to aggregate that land with private land owned by the applicant for purposes of its economic feasibility determination and where the record is inadequate to make a determination based on aggregation.

Harriett B. Ravenscroft, 105 IBLA 324 (Nov. 10, 1988)

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

DESERT LAND ENTRY--ContinuedAPPLICATIONS--Continued

A decision to reject a desert land entry application because the lands identified in the application cannot be farmed as an economically feasible operating unit will be affirmed where the record supports such a conclusion and appellant has failed to provide evidence which would establish error in the BLM decision.

Sally Ann Lana Henderson, Donald James Henderson, 107 IBLA 193 (Feb. 14, 1989)

The death of an applicant for a desert land entry will cause the application to lapse and, hence, where an applicant dies during the course of an appeal from rejection of his application, the appeal is properly dismissed as moot.

A BLM decision rejecting a desert land entry application because it is considered not economically feasible to farm the land applied for based on a computer projection may be set aside and the case remanded where the applicant alleges facts which would tend to support a different conclusion and the BLM analysis has failed to consider relevant aspects of appellant's plan of development.

Leroy R. Davis, Susan H. Davis, 107 IBLA 204 (Feb. 16, 1989)

Rejection of a desert land entry application on the grounds that the lands applied for are not a viable economic unit will be set aside and the case remanded for readjudication when BLM fails to consider the applicant's proposal to use an existing well or the equipment he has on hand or the crops he plans to plant.

G. V. (Pete) Cope, 109 IBLA 226 (June 16, 1989)



DESERT LAND ENTRY--Continued

## CANCELLATION

The Government, by granting an extension of time to an entryman in which to make his proof of a completed desert land entry, is not estopped from a later rejection of that entry by virtue of the fact that an extension of time was allowed. When, at the time of granting the entryman additional time to prove he conveyed water upon desert land, the Government cautioned the entryman that he would be required to prove compliance with his irrigation plan, the entryman had notice he would be required to show his plan of reclamation had been completed when final proof was made.

United States v. James M. Mills (On Reconsideration), 94 IBLA 59 (Sept. 26, 1986)

A desert land entry is properly cancelled when the entryman fails to submit annual proof showing the requisite improvement of the entry during the first year of the life of the entry.

Fineas G. Hughbanks, 97 IBLA 250 (May 13, 1987)

## CLASSIFICATION

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

## CULTIVATION AND RECLAMATION

A ruling by BLM that the jojoba plant does not meet the requirements of the desert land entry laws will not support rejection of a desert land entry application where the record does not indicate that BLM analyzed data submitted by the applicant showing

DESERT LAND ENTRY--Continued

## CULTIVATION AND RECLAMATION--Continued

the economic feasibility of the commercial cultivation of the jojoba plant.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

## DISTRIBUTION SYSTEM

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

## EXTENSION OF TIME

An application for an extension of time to make final proof, as authorized by the Act of Mar. 28, 1908, 43 U.S.C. § 333 (1982), is not properly rejected solely because it was made during the course of the final proof meeting at the conclusion of the entry.

Anna R. Williams, Frances L. Roylance, 108 IBLA 88 (Mar. 28, 1989)

Where a desert land entryperson is allowed only one extension of time to file final proof under each of three statutes (43 U.S.C. §§ 333, 334, and 336 (1982)), and has received those three extensions, a further request must be denied, regardless of the authority

DESERT LAND ENTRY--ContinuedEXTENSION OF TIME--Continued

cited by BLM in granting the extensions, because no further authority exists for approving extensions.

Where a desert land entrypersion claims reliance on incorrect citations in BLM decisions granting extensions of time to file final proof, in order to claim the existence of authority for a further extension of time, such reliance clearly cannot create any rights not authorized by law.

Elaine S. Stickelman, 108 IBLA 392 (May 22, 1989)

LANDS SUBJECT TO

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

WATER RIGHT

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority

DESERT LAND ENTRY--ContinuedWATER RIGHT--Continued

has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

A desert land entry application is properly rejected where the applicant fails to provide evidence of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right.

Albert N. Smith et al., 87 IBLA 253 (June 20, 1985)

When, on the face of a desert land application, an applicant has indicated that he or she has proceeded as far as possible in obtaining a water right but has failed to document this fact in the application, it is error to reject the application under 43 CFR 2521.2(d) without first affording the applicant an opportunity to submit proof corroborating the assertions on the application.

Jean P. Walsh, 89 IBLA 311 (Nov. 12, 1985)

A desert land entry application is properly rejected when a conflicting application has shown sufficient evidence of a water right and has been allowed for entry for the same land. A desert land entry application is properly considered by BLM prior to a conflicting application where the record shows it was drawn with first priority in a drawing held July 30, 1979, consistent with 43 CFR 1821.2-3, pursuant to a notice published in the Federal Register opening the subject lands in Nevada to desert land filings.

Blaine Sharp, 89 IBLA 400 (Nov. 22, 1985)

DESERT LAND ENTRY--ContinuedWATER RIGHT--Continued

A decision rejecting a desert land entry application will be affirmed where the applicant proposes to irrigate his entry from underground water sources but fails to show that he has acquired a right from the state to appropriate underground water or that he is qualified under state law to obtain the necessary right to appropriate water.

Richard H. Greener, 91 IBLA 205 (Mar. 31, 1986)

A desert land entry application gains no priority as against a subsequently filed Carey Act application where the desert land entry applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

Harlon S. Dobson, Cynthia D. Dobson, 95 IBLA 37 (Dec. 15, 1986)

The Bureau of Land Management properly rejects a desert land application when the applicant proposes to irrigate his entry from underground water sources, but indicates on the face of the application that he has not taken appropriate steps, as far as then possible, toward the acquisition of a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portions of the land described in the application.

Wesley A. Painter, 98 IBLA 69 (June 9, 1987)

WATER SUPPLY

Where after weighing all the evidence presented at a hearing in a Government contest of a desert land entry, the Administrative Law Judge determines a desert

DESERT LAND ENTRY--ContinuedWATER SUPPLY--Continued

land entryman failed to irrigate his entry in conformity to his proposed plan of operations as of the date of final proof, the entry is properly cancelled.

United States v. James M. Mills, 91 IBLA 370 (Apr. 28, 1986)

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

EMINENT DOMAIN

(See also Irrigation Claims--if included in this Index.)

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)



# ENDANGERED SPECIES ACT OF 1973--Continued

## SECTION 7--Continued

### GENERALLY

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Under regulations promulgated at 50 CFR Part 402, consultation with the Fish and Wildlife Service is required with respect to a timber sale conducted by the Bureau of Land Management only when BLM determines that the timber sale would affect a listed species or its habitat, unless the sale is a major Federal action significantly affecting the quality of the human environment within the meaning of 42 U.S.C. § 4332(2)(C) (1982).

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

## SECTION 7

### Generally

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption

### Generally--Continued

pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

When approving applications for permit to drill on an existing acquired lands oil and gas lease, BLM may properly impose seasonal restriction stipulations on drilling in order to protect an endangered species of bird and, at the behest of the surface managing agency, to preclude drilling during the flood season.

Prado Petroleum Co., 103 IBLA 247 (July 26, 1988)

In accordance with sec. 7(a)(2) of the Endangered Species Act, as amended, 16 U.S.C. § 1536(a)(2) (1982), BLM is required to assure that any action authorized by it is not likely to jeopardize the continued existence of any threatened or endangered species or to result in the adverse modification of the critical habitat of such species, and to use the best scientific and commercial data available to fulfill this requirement. Disagreement as to the methodology used is insufficient to justify reversal of BLM's decision as long as BLM's choice of methodology is reasonable.

The Sierra Club et al., 104 IBLA 76 (Aug. 29, 1988)

Under regulations promulgated at 50 CFR Part 402, consultation with the Fish and Wildlife Service is required with respect to a timber sale conducted by the Bureau of Land Management only when BLM determines that the timber sale would affect a listed species or its habitat, unless the sale is a major Federal action significantly affecting the quality of the human

ENDANGERED SPECIES ACT OF 1973--Continued

## SECTION 7--Continued

Generally--Continued

environment within the meaning of 42 U.S.C. § 4332(2)(C) (1982).

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

Critical\_Habitat

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Under regulations promulgated at 50 CFR Part 402, consultation with the Fish and Wildlife Service is required with respect to a timber sale conducted by the Bureau of Land Management only when BLM determines that the timber sale would affect a listed species or its habitat, unless the sale is a major Federal action significantly affecting the quality of the human environment within the meaning of 42 U.S.C. § 4332(2)(C) (1982).

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

ENDANGERED SPECIES ACT OF 1973--Continued

## SECTION 7--Continued

Mitigation

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species, or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

ENVIRONMENTAL POLICY ACT

(See also National Environmental Policy Act of 1969--if included in this Index.)

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 185 (Feb. 26, 1985)

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is



## ENVIRONMENTAL POLICY ACT--Continued

reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed

## ENVIRONMENTAL POLICY ACT--Continued

unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource



ENVIRONMENTAL POLICY ACT--Continued

stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

A 1979 environmental impact statement describing both site-specific and aggregate effects of coal mining does not require supplementation in the absence of significant change in the proposed operation.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 92 I.D. 389 (Sept. 27, 1985)

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35 (Feb. 26, 1987)

ENVIRONMENTAL POLICY ACT--Continued

The Board of Land Appeals has jurisdiction to review a decision by BLM not to prepare a supplemental environmental impact statement pursuant to 40 CFR 1502.9(c)(1)(ii).

BLM's decision not to prepare a supplemental environmental impact statement in accordance with 40 CFR 1502.9(c)(1)(ii), will be affirmed if such decision is reasonable, depending upon such factors as (1) the environmental significance of the new information, (2) the probable accuracy of the information, (3) the degree of care with which it considered the information and evaluated its impact, and (4) the degree to which BLM supported its decision not to supplement with a statement of explanation or additional data.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

The Board will affirm BLM's decision approving an application for permit to drill where that approval was based upon an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment, and where that approval was conditioned upon the operator's preparation of an acceptable contingency plan for the protection of individuals endangered by a potential emergency.

Elberta M. Taylor et al., 102 IBLA 372 (June 14, 1988)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's

ENVIRONMENTAL POLICY ACT--Continued

decision is reasonable and supported by the record on appeal.

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

The categorical exclusion found at 516 DM 6, the Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal

ENVIRONMENTAL POLICY ACT--Continued

if BLM's decision is reasonable and supported by the record on appeal.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

ENVIRONMENTAL QUALITY  
(See also Water Pollution Control--if included in this Index.)

GENERALLY

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)



ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Appendix 2, § 2.8.

Analysis of the impact of a proposed action under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or environmental impact statement in connection with issuance of a noncompetitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition,  
84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 185  
(Feb. 26, 1985)

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is

ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS--Continued

reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of



ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS--Continued

a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource

ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS--Continued

stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency makes a decision which permits action by another party. Ordinarily some overt act by a federal agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal approval of action conducted by state and local authorities on the public domain.

Idaho Natural Resources Legal Foundation, 88 IBLA 201 (Aug. 28, 1985)

ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS--Continued

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance

ENVIRONMENTAL QUALITY--Continued

## ENVIRONMENTAL STATEMENTS--Continued

with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19 (Feb. 26, 1987) 94 I.D. 35

The Board of Land Appeals has jurisdiction to review a decision by BLM not to prepare a supplemental environmental impact statement pursuant to 40 CFR 1502.9(c)(1)(ii).

BLM's decision not to prepare a supplemental environmental impact statement in accordance with 40 CFR 1502.9(c)(1)(ii), will be affirmed if such decision is reasonable, depending upon such factors as (1) the environmental significance of the new information, (2) the probable accuracy of the information, (3) the degree of care with which it considered the information and evaluated its impact, and (4) the degree to which BLM supported its decision not to supplement with a statement of explanation or additional data.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

The Board will affirm BLM's decision approving an application for permit to drill where that approval was based upon an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment, and where that approval was conditioned upon the operator's preparation of an acceptable contingency plan for the protection of individuals endangered by a potential emergency.

Elberta M. Taylor et al., 102 IBLA 372 (June 14, 1988)

The Board will affirm BLM's approval of an application for permit to drill based on an environmental impact statement when the record reveals that BLM carefully considered all factors relevant to its decision and appellants fail to present compelling reasons for reversal or modification. Mere differences of opinion provide no basis for reversal if



ENVIRONMENTAL QUALITY--ContinuedENVIRONMENTAL STATEMENTS--Continued

BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club et al., 104 IBLA 76 (Aug. 29, 1988)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

The Board will dismiss an appeal from a determination that a proposed action will not have a significant impact on the quality of the human environment where the record establishes a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. One who challenges the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal when the determination is reasonable and supported by the record on appeal.

In the Matter of the Appeal of Grand Lake Ass'n, Inc., 8 OHA 1 (Dec. 20, 1988)

ENVIRONMENTAL QUALITY--ContinuedENVIRONMENTAL STATEMENTS--Continued

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club, Inc., et al., 107 IBLA 96 (Feb. 1, 1989)

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The Desert Tortoise Habitat Management Plan is a document designed to guide and control future management actions and does not take specific action or implement a decision or action. The "management actions" it identifies are not the type of specific actions or land-use decisions which are appealable to the Board.

California Ass'n of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (Apr. 3, 1989)



ENVIRONMENTAL QUALITY--ContinuedENVIRONMENTAL STATEMENTS--Continued

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

HERBICIDES

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§

ENVIRONMENTAL QUALITY--ContinuedHERBICIDES--Continued

4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency makes a decision which permits action by another party. Ordinarily some overt act by a federal agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal approval of action conducted by state and local authorities on the public domain.

Idaho Natural Resources Legal Foundation, 88 IBLA 201 (Aug. 28, 1985)

EQUAL ACCESS TO JUSTICE ACTGENERALLY

The apparent purpose of sec. 504(c)(1) is to give the court to which an agency action is appealed sole authority to hear and decide applications for fees and expenses for the costs of both judicial review and the underlying administrative proceeding.

A decision of this Board is an "order" under the Administrative Procedure Act and, therefore, an "adjudication"; however, it does not follow that such a decision is an adjudication under 5 U.S.C. § 554 (1982).

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Benton C. Cavin, 93 IBLA 211 (Aug. 20, 1986)

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitsu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBLA 141 (June 19, 1989)

EQUAL ACCESS TO JUSTICE ACT--ContinuedGENERALLY--Continued

Under the Equal Access to Justice Act, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified is entitled to attorney fees and other expenses based upon a constructive attorney charge of \$75 per hour and upon actual law clerk costs for the hours worked, plus related expenses despite the fact that the actual legal fees paid by the appellant were determined by a contingent fee arrangement with its attorney, rather than on an hourly basis.

Under the Equal Access to Justice Act, where an eligible prevailing party was not substantially justified, is found to have carefully excluded its unallowable attorney fees and expenses, such as those involving periods preceding, or matters extraneous to, its appeal before the Board; and where both the periods of time charged and the costs claimed as allowable in the proceeding before the Board appear to be reasonable; and where it is clear that the amount being sought as allowable will not compensate the applicant for even the majority of its appeal costs, the Board will exercise its discretion in accepting the fees and expenses applied for as reasonable under the circumstances, without undertaking the detailed inquiry it would normally make.

Application for Attorney Fees of Middlesex Contractors & Riggers, Inc., IBCA-2654-F (Sept. 6, 1989)

Under the Equal Access to Justice Act, an eligible applicant that has prevailed in an adversary adjudication before the Board, may nevertheless not recover its attorney fees, and other expenses connected with such proceedings, where the Government demonstrates that its position was substantially justified, i.e., that it had a reasonable basis in law and fact.

Application for Attorney Fees Appeal of Scalf Engineering Co. & Pike County Construction Co., IBCA-2659-F (Sept. 12, 1989)

EQUAL ACCESS TO JUSTICE ACT--ContinuedGENERALLY--Continued

The position of the Government is not substantially justified where, prior to the contracting officer's decision, the claimant accurately pointed out the governing FAR provision and the reason payment was proper under it; but the contracting officer disregarded the clear intent of the FAR provision and denied payment, forcing an appeal.

Application for Attorney Fees, Northwest Piping, Inc., IBCA-2642-F (Nov. 15, 1989)

The position of the Government in denying appellant's termination settlement claim was reasonable and substantially justified where the parties negotiated a settlement agreement, without litigation, including only 18 percent of the claimed direct and indirect costs and profit claimed, and such agreement reimbursed appellant for the expenses incurred during the negotiation period, including loan interest expense, settlement expenses, attorney fees, and Contract Disputes Act interest on the amount awarded.

Application of Russell Drilling Co., Inc., for Fees & Expenses under EAJA, IBCA-2560-F (Nov. 30, 1989)  
96 I.D. 480

ADVERSARY ADJUDICATION

Where BLM seeks to assess trespass damages and to take related action, including cancelling existing authorized grazing use, on the basis of charges that the permittee has grazed excess numbers of cattle in trespass on public land, followed by a hearing and appeal to the Board, BLM will be considered to have engaged in an adversary adjudication within the meaning of sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. III 1985).

Bureau of Land Management v. David & Bonnie Ericsson, 98 IBLA 258 (July 7, 1987)

EQUAL ACCESS TO JUSTICE ACT--ContinuedADVERSARY ADJUDICATION--Continued

The position of the Government is not substantially justified where, prior to the contracting officer's decision, the claimant accurately pointed out the governing FAR provision and the reason payment was proper under it; but the contracting officer disregarded the clear intent of the FAR provision and denied payment, forcing an appeal.

Application for Attorney Fees, Northwest Piping, Inc.,  
IBCA-2642-F (Nov. 15, 1989)

APPLICATION

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson,  
98 IBLA 258 (July 7, 1987)

Under the Equal Access to Justice Act, an eligible applicant that has prevailed in an adversary adjudication before the Board, may nevertheless not recover its attorney fees, and other expenses connected with such proceedings, where the Government demonstrates that its position was substantially justified, *i.e.*, that it had a reasonable basis in law and fact.

Application for Attorney Fees Appeal of Scalf Engineering Co. & Pike County Construction Co., IBCA-2659-F  
(Sept. 12, 1989)

AWARDS

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was

EQUAL ACCESS TO JUSTICE ACT--ContinuedAWARDS--Continued

substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson,  
98 IBLA 258 (July 7, 1987)

Where the Board found that a contractor was not entitled to an EAJA award for an unsuccessful claim because it was not the prevailing party on that claim, but found that the contractor's attorneys spent a negligible amount of time on preparation and presentation of such claims in comparison to the time spent on the other three claims involved in the principal litigation, the Board determined by a jury verdict approach that appellant's attorneys and their paralegals spent no more than 6 and 10 hours respectively on the unsuccessful claim and held that, therefore, only \$800 should be deducted from the EAJA application request of \$74,460.

Application of Intersea Research Corp. for Fees & Expenses Under EAJA, IBCA-2084-F (Dec. 20, 1988)  
95 I.D. 349

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees),  
IBCA-2382-F (June 23, 1989)  
96 I.D. 280

Under the Equal Access to Justice Act, an eligible applicant that has prevailed before the Board in an appeal in which the Government's position clearly was not substantially justified is entitled to attorney fees and other expenses based upon a constructive attorney charge of \$75 per hour and upon actual law clerk costs for the hours worked, plus related expenses, despite the fact that the actual legal fees paid by the appellant were determined by a contingent



EQUAL ACCESS TO JUSTICE ACT--ContinuedAWARDS--Continued

fee arrangement with its attorney, rather than on an hourly basis.

Under the Equal Access to Justice Act, where an eligible prevailing party was not substantially justified, is found to have carefully excluded its unallowable attorney fees and expenses, such as those involving periods preceding, or matters extraneous to, its appeal before the Board; and where both the periods of time charged and the costs claimed as allowable in the proceeding before the Board appear to be reasonable; and where it is clear that the amount being sought as allowable will not compensate the applicant for even the majority of its appeal costs, the Board will exercise its discretion in accepting the fees and expenses applied for as reasonable under the circumstances, without undertaking the detailed inquiry it would normally make.

Application for Attorney Fees of Middlesex Contractors & Riggers, Inc., IBCA-2654-F (Sept. 6, 1989)

Under an EAJA application, the Government's contention that the hours claimed for attorneys and a consultant were excessive is rejected by the Board, where it finds that although the hours claimed in both categories appeared to be high upon an initial review, a careful examination of the detailed information submitted in support of the application convinced the Board that none of the time expended was unreasonable for the tasks undertaken and that each task was appropriate for proper representation.

Quality Seeding, Inc. (Application for Attorney Fees) IBCA-2552-F (Nov. 17, 1989) 96 I.D. 473

CONTRACT DISPUTES ACT OF 1978Allowable Expenses

An applicant for attorney fees is not entitled to an award by the Board for costs incurred in connection with court proceedings, travel, telephone bills, or postage. The Board has no obligation to seek clarification of an application that fails to explain, allocate, or prorate fees and expenses; and in

EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedAllowable Expenses--Continued

appropriate circumstances, such as in this case, the application may be denied on that basis.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov. 28, 1986) 93 I.D. 437

Upon determining that the inaction of the Government in failing to respond to the contractor's several requests for clarification of defective specifications was unreasonable, the Board holds that the Government has thus failed to establish a substantially justified position. Further, the Board holds: that it has no authority, under the EAJA, to allow an award for attorney fees in excess of \$75 per hour, in the absence of an agency regulation providing otherwise; that the EAJA excludes the allowance of costs for lay witnesses; that docket fees not paid are not allowable; and that photocopying charges not shown to be necessary in the preparation and presentation of the underlying litigation will not be allowed as excessive and unreasonable.

Application of James W. Sprayberry Construction for Costs, Fees, & Expenses, IBCA-2298-F (May 4, 1989) 96 I.D. 194

Where, in the underlying proceeding, involving a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the Board concluded that a 3-week delay for an airworthiness inspection ordered by the contracting officer constituted a suspension of work for an unreasonable period, and such conclusion was based on findings that the contractor's aircraft were airworthy, that the inspection was for the convenience of the Government, and not based on the fault or negligence of the contractor, the Board holds that the Government failed to sustain its burden of proving substantial justification. Further, the Board holds that under the EAJA, Sec. 5, Title 5, United States Code, it has no authority to award attorney fees in excess of \$75 per hour, or to award costs for travel or other expenses which cannot fit

EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedAllowable Expenses--Continued

into one of the categories itemized in (b)(1)(A) of said section.

Application of Hawkins & Powers Aviation, Inc., for Fees & Other Expenses, IBCA-2243-F (July 21, 1989)  
96 I.D. 324

Prevailing Party

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov. 28, 1986)  
93 I.D. 437

Where the Board found that a contractor was not entitled to an EAJA award for an unsuccessful claim because it was not the prevailing party on that claim, but found that the contractor's attorneys spent a negligible amount of time on preparation and presentation of such claim in comparison to the time spent on the other three claims involved in the principal litigation, the Board determined by a jury verdict approach that appellant's attorneys and their paralegals spent no more than 6 and 10 hours respectively on the unsuccessful claim and held that, therefore, only \$800 should be deducted from the EAJA application request of \$74,460.

Application of Intersea Research Corp. for Fees & Expenses Under EAJA, IBCA-2084-F (Dec. 20, 1988)  
95 I.D. 349

EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedPrevailing Party--Continued

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

Salisbury & Dietz, Inc. (Application for Attorney Fees), IBCA-2382-F (June 23, 1989)  
96 I.D. 280

Special Circumstances

Attorney fees and expenses will not be awarded to a contractor that has unreasonably protracted the proceedings because of its failure to keep adequate records; its initial delay in submitting its claims; its repeated failures to provide consistent claims data; and its submission of substantial but unmeritorious new claims in its answers to the Government's interrogatories just prior to the hearing.

Central Colorado Contractors, Inc., IBCA-2078-F (Nov. 28, 1986)  
93 I.D. 437

Substantially Justified

The position of the Government is substantially justified, and attorney fees under the Equal Access to Justice Act are not warranted where, in connection with a construction contract, (1) the contracting officer clearly acted reasonably and in the contractor's interest by allowing two claims and reducing the liquidated damages recommended in the Government's post-completion audit, but denying other claims for lack of proof, and (2) the agency later permitted the contractor to submit additional claims and attempted to resolve them by further audit and through interrogatories and by stipulating to certain further entitlements, but requiring the other claims to be



EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedSubstantially Justified--Continued

resolved by a hearing, in a situation where the Board's ultimate award was primarily by jury verdict.

Central Colorado Contractors, Inc., IBCA-2078-F  
(Nov. 28, 1986) 93 I.D. 437

Where the Government has not acted arbitrarily or unreasonably in its negotiations prior to the Board's hearing on the merits of an underlying contract appeal, but facts and explanations become evident at the hearing that the Government would not ordinarily have been expected to know, which evidence ultimately entitles appellant to prevail on its contract claims, then the hearing was clearly essential to the appellant's case and appellant is not entitled to attorney fees or costs, since the Government's position in contesting the claim prior to the hearing was substantially justified.

Stephen J. Kenney (Application for Attorney Fees),  
IBCA-2132-F (Oct. 8, 1987)

The Government's position in contesting a contractor's claim for interest on a disputed construction claim paid pursuant to a settlement agreement was not substantially justified where: (1) the contracting officer ultimately paid the entire amount of the contractor's claim except for interest; (2) the contracting officer's decision denying entitlement to interest on the basis of noncertification was legally in error; (3) the contracting officer's affidavit that he thought interest was included in the settlement agreement had an insufficient basis and was patently inconsistent with other documents in the record; and (4) the appeal file compiled by the contracting officer inexplicably failed to include numerous documents that were essential to the proper resolution of the dispute between the parties, thereby giving rise to questionable assertions by counsel.

A&J Construction Co., Inc. (Application for Attorney Fees), IBCA-2376-F (Feb. 4, 1988)

EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedSubstantially Justified--Continued

Upon determining that the inaction of the Government in failing to respond to the contractor's several requests for clarification of defective specifications was unreasonable, the Board holds that the Government has thus failed to establish a substantially justified position. Further, the Board holds: that it has no authority, under the EAJA, to allow an award for attorney fees in excess of \$75 per hour, in the absence of an agency regulation providing otherwise; that the EAJA excludes the allowance of costs for lay witnesses; that docket fees not paid are not allowable; and that photocopying charges not shown to be necessary in the preparation and presentation of the underlying litigation will not be allowed as excessive and unreasonable.

Application of James W. Sprayberry Construction for Costs, Fees, & Expenses, IBCA-2298-F (May 4, 1989)  
96 I.D. 194

Where, in the underlying proceeding, involving a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the Board concluded that a 3-week delay for an airworthiness inspection ordered by the contracting officer constituted a suspension of work for an unreasonable period, and such conclusion was based on findings that the contractor's aircraft were airworthy, that the inspection was for the convenience of the Government, and not based on the fault or negligence of the contractor, the Board holds that the Government failed to sustain its burden of proving substantial justification. Further, the Board holds that under the EAJA, Sec. 5, Title 5, United States Code, it has no authority to award attorney fees in excess of \$75 per hour, or to award costs for travel or other expenses which cannot fit into one of the categories itemized in (b)(1)(A) of said section.

Application of Hawkins & Powers Aviation, Inc. for Fees & Other Expenses, IBCA-2243-F (July 21, 1989)  
96 I.D. 324



EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedSubstantially Justified--Continued

The Government's position is found not to be substantially justified in a case involving a contract partially terminated for the Government's convenience, where the Board finds (i) that there was no constancy in the Government's estimate of the costs to complete the terminated portion of the contract; (ii) that at the contracting officer level and in litigation the Government ignored the distinction between what might be considered a fair profit under a competitively bid contract terminated for the Government's convenience and what would be a fair profit if a negotiated contract is so terminated; and (iii) that in determining what a fair profit should be the contracting officer largely ignored the factors set forth in FAR 49.202(b).

Quality Seeding, Inc. (Application for Attorney Fees),  
IBCA-2552-F (Nov. 17, 1989) 96 I.D. 473

The position of the Government in denying appellant's termination settlement claim was reasonable and substantially justified where the parties negotiated a settlement agreement, without litigation, including only 18 percent of the claimed direct and indirect costs and profit claimed, and such agreement reimbursed appellant for the expenses incurred during the negotiation period, including loan interest expense, settlement expenses, attorney fees, and Contract Disputes Act interest on the amount awarded.

Application of Russell Drilling Co., Inc., for Fees & Expenses under EAJA, IBCA-2560-F (Nov. 30, 1989)  
 96 I.D. 480

Where in a contract appeal decision the Board granted the substance of the appeal relying on fundamental principles of public contract law, it also in a subsequent EAJA application deemed the Government position in the underlying case to be unreasonable because the Government knew or should have known that its position was contrary to those fundamental principles regardless of the complexity of the underlying facts; when the Government failed otherwise to show that its position was substantially justified or that there were special circumstances present such as would justify denying the application, the Board

EQUAL ACCESS TO JUSTICE ACT--ContinuedCONTRACT DISPUTES ACT OF 1978--ContinuedSubstantially Justified--Continued

granted the application and ordered the award of fees and expenses accordingly.

Application of Alamo Navajo School Board, Inc., for Fees & Expenses Under EAJA, IBCA-2578-F, 2579-F (Dec. 22, 1989)

EQUITABLE ADJUDICATIONSUBSTANTIAL COMPLIANCE

Substantial compliance with the law is a prerequisite for the invocation of equitable adjudication to permit consideration of a homesite purchase application that was not filed within the time required.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

To obtain equitable adjudication pursuant to 43 CFR 1871.1-1, a desert land entryman is required to show substantial compliance with requirements for providing an adequate water supply and distribution system for his desert land entry. Failure to show substantial compliance with reclamation requirements requires rejection of a petition for equitable adjudication of the entry.

Failure to show that substantial compliance with reclamation requirements of the Desert Land Entry Act was prevented by accident, mistake, or some circumstance beyond the control of the entryman requires rejection of a petition for equitable adjudication and cancellation of the entry.

James M. Mills, 108 IBLA 155 (Apr. 10, 1989)

EQUITABLE ADJUDICATION--ContinuedSUBSTANTIAL COMPLIANCE--Continued

Where substantial compliance is a prerequisite for the invocation of equitable adjudication, the principle is not applicable to a mining claim deemed abandoned and void for failure to timely submit the annual filing required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), because, as the Supreme Court in Locke v. United States, 471 U.S. 84 (1985), held, there is no possibility of substantial compliance where the claimant has failed to comply with the deadline established by Congress. Further, the fact that Congress made sec. 314 self-operative and did not provide the Department with the authority to waive the statutory consequences for failure to comply, dispels the view that Congress intended for a claim deemed abandoned and void to be eligible for reinstatement under some other avenue.

Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1 (July 5, 1989)

ESTOPPEL

Reliance upon erroneous advice provided by Federal employees cannot create rights not authorized by law.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

The United States is not barred by the equitable defenses of estoppel and laches from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim

ESTOPPEL--Continued

of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

Thomas Bohr, Jr., William Collister, 89 IBLA 384 (Nov. 22, 1985)

Charles J. Frank, 90 IBLA 33 (Dec. 10, 1985)

Sherbourne Partnership, 90 IBLA 130 (Dec. 24, 1985)

Neither laches nor estoppel will bar a decision that a mining claim is void from its inception, notwithstanding the claimant's good faith expenditure of labor and money for the benefit of the claim. BLM has no affirmative duty to mineral locators to promptly check the legal status of every claim filed with them and to apprise a claimant of its findings; and claimant's reliance upon erroneous information from BLM employees cannot create rights not authorized by law.

David D. Beal, 90 IBLA 91 (Dec. 23, 1985)

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

ESTOPPEL--Continued

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

Where an oil and gas operator obtains oral permission to do preliminary work at a drilling site for which an application for permit to drill is pending, and then begins drilling without written permission to do so in violation of Departmental regulation, there is no factual basis for finding an estoppel of the Government which would prevent assessment of a penalty for unauthorized drilling operations.

William Perlman, 91 IBLA 208 (Apr. 2, 1986) 93 I.D. 159

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

Reliance on erroneous or incomplete information given by an employee of the Department will not excuse an oil and gas operator from compliance with applicable law and regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

ESTOPPEL--Continued

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

A party asserting a claim of estoppel based on a misrepresentation must be ignorant of the true facts and his reliance on the misrepresentation must be reasonable under the circumstances. Where appellant knew certain oil and gas leases were allegedly expired for lack of production from a communitized well, BLM will not be estopped to hold the leases expired based on a representation of a BLM employee without knowledge of the production status that, based on the records, the leases were in effect.

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)



ESTOPPEL--Continued

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a \$75 processing fee for each Part B application form, where the applicant failed to submit separate remittances in payment of the filing fees and first year's rentals with each Part B application, notwithstanding written advice from BLM that a single remittance would be acceptable.

Thomas S. Arnold, 97 IBLA 271 (May 14, 1987)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The Bureau of Indian Affairs is not estopped from reversing an approval of a lease document given in error.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations and reliance on incomplete or incorrect information cannot create any rights not authorized by law.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

ESTOPPEL--Continued

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

The Board of Land Appeals has well-established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970); the rule that estoppel is an extraordinary remedy especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

The Board of Land Appeals has expressly ruled that, as a precondition for evoking the defense of estoppel, the erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision.

Enfield Resources, 101 IBLA 120 (Feb. 8, 1988)

Cyprus Western Coal Co., 103 IBLA 278 (Aug. 3, 1988)

The Department does not have an affirmative duty to immediately adjudicate mineral recordation filings.

Joseph L. Frankmore, 101 IBLA 202 (Feb. 22, 1988)

OSMRE is not estopped to require elimination of highwalls by the fact that its inspectors failed to inform the permittee of this obligation during the course of mining.

Shelbiana Construction Co. v. Office of Surface Mining Reclamation & Enforcement, Sammy Goff v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 19 (Apr. 6, 1988)

ESTOPPEL--Continued

The Department has long recognized the need to apply the administrative counterpart of the principle of res judicata--the doctrine of administrative finality--to preclude reconsideration of a decision of an agency official when a party, or his predecessor in interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. The rule is subject to the exception that review is available to correct or reverse an erroneous decision upon a showing of compelling legal or equitable reasons such as violations of basic rights or the need to prevent an injustice.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA III (Apr. 20, 1988)

Even though the elements necessary for invoking estoppel against the United States may be present, with estoppel will not lie if to do so would interfere with underlying Government policies or unduly undermine the enforcement of a particular law or regulation. An approval of an assignment of grazing rights within the Capitol Reef National Park to a party not an heir of the holder of those rights on Dec. 18, 1971, contrary to the express provisions of 16 U.S.C. § 273b (1982), may be rescinded after a lapse of 9 years, as the Bureau of Land Management had no authority to approve such assignment, and to do so would be directly contrary to the intent of Congress when establishing the park.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)

An alleged misrepresentation by BLM of mining claim recordation requirements is not an appropriate basis for equitable estoppel where the party asserting estoppel could have become aware of the true requirements by reference to explicit provisions of the governing Federal statute and Departmental regulations. Furthermore, a claim of estoppel based on appellants' vague allegations that they made the filing "on the instruction from the BLM office" fails, because appellants have not established that BLM made a crucial misstatement in an official

ESTOPPEL--Continued

decision or otherwise engaged in any "official misconduct."

Henry E. Krizman et al., 104 IBLA 9 (Aug. 15, 1988)

Where an operator begins excavation of coal on Federal lands without a Federal permit, negotiates with OSMRE to suspend enforcement action pending litigation in Federal court of the need for a Federal permit, and ceases operations in reliance upon the agreement, OSMRE is bound by the terms of the agreement made with the operator and may not issue a notice of violation for conditions created by the agreement itself.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 53 (Oct. 17, 1988)

Failure to specifically exclude a category of leases in a Notice to Lessee or Notice to Payors stating that royalties were not required for "oil and gas used for production purposes on OCS oil and gas leases" is not affirmative misconduct that will support estoppel against the Government.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

The application of the doctrine of equitable estoppel against the Federal Government is justified only if doing so does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

ESTOPPEL--Continued

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglect of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not

ESTOPPEL--Continued

estopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

Where a desert land entryperson claims reliance on incorrect citations in BLM decisions granting extensions of time to file final proof in order to claim the existence of authority for a further extension of time, such reliance clearly cannot create any rights not authorized by law.

Elaine S. Stickelman, 108 IBLA 392 (May 22, 1989)

The United States is not barred by the equitable defense of estoppel from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

BLM is not required under the doctrine of either bona fide rights or equitable estoppel to accept a line which has been surveyed on the ground with appropriate monumentation but which has never been officially approved by BLM, even where private landowners may have relied on the monuments in purchasing land and constructing improvements.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 110 IBLA 25 (July 7, 1989)

Estoppel will not lie when the party asserting it is charged with knowledge of the requirements of a regulation, because the person is not ignorant of the true facts. OSMRE's failure to inform a permittee of



ESTOPPEL--Continued

a requirement to eliminate an underwater highwall by grading it to an appropriate contour does not constitute affirmative misconduct for purposes of estoppel.

Approval of a permit application by a state regulatory authority is not litigation that would preclude subsequent issuance of a notice of violation by OSMRE under the doctrine of collateral estoppel.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

One who holds an oil and gas lease from the United States is presumed to know the applicable laws and regulations, and the United States cannot be bound or estopped by acts of its officers or agents, if doing so would undermine the correct enforcement of a particular law or regulation. Reliance upon erroneous or incomplete information provided by a BLM employee will not overcome a clear regulatory requirement.

Stephen G. Moore, 111 IBLA 326 (Oct. 31, 1989)

EVIDENCE

## GENERALLY

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants the right to appropriate groundwater for irrigation of the entries where the water authority

EVIDENCE--Continued

## GENERALLY--Continued

has taken no official action on the water applications pending before it.

Julie A. Peterson et al., 86 IBLA 118 (Apr. 15, 1985)

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM and there is no evidence that the claimant filed any other document with BLM on that date serves to rebut the presumption of non-filing which is customarily applied where BLM's records indicate a required filing has not occurred. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates that, more likely than not, a required document was in fact received by BLM.

Richard A. Willers, 101 IBLA 106 (Feb. 2, 1988)

Evidence that a mining claimant possesses an acknowledgment receipt card with an attachment purportedly listing those claims for which annual filings were received during the calendar year in question and the fact that BLM does not challenge her characterization of the evidence serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not been made.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)

EVIDENCE--ContinuedGENERALLY--Continued

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

EVIDENCE--ContinuedGENERALLY--Continued

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

ADMISSIBILITY

A document gathering, compiling and restating items in evidence as supplemented by items not in evidence and developed through the use of assumptions based on items not in evidence or on faulty interpretations of items in evidence was ordered struck from the Government's post-hearing brief, because the record was closed and because the document presented additional matter which was not subject to cross-examination and rebuttal by the appellant.

Appeal of Quality Seeding, Inc., IBCA-2297 (Aug. 8, 1988)  
95 I.D. 125

EVIDENCE--Continued

## BURDEN OF PROOF

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation, the bidder must not only disprove the Government's fair market estimates, but must also prove that his bids constitute fair market value. However, appellant does not bear this burden until after the Government has established a prima facie case supporting its estimates.

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence

EVIDENCE--Continued

## BURDEN OF PROOF--Continued

that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

The burden of proof is on an appellant to show error in the decision appealed from and, in the absence of such a showing, the decision will be affirmed.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

A noncompetitive oil and gas lease applicant who challenges the determination that land is within a known geologic structure bears the burden of proving by a preponderance of the evidence that the determination is erroneous.

Edward W. Eidt, 89 IBLA 270 (Nov. 8, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)



EVIDENCE--ContinuedBURDEN OF PROOF--Continued

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation and presents sufficient documentation supporting its valuation, the bidder must not only disprove the Government's fair market value estimates, but must also prove that his bid constitutes fair market value.

I. K. Rosen, 94 IBLA 202 (Nov. 4, 1986)

EVIDENCE--ContinuedBURDEN OF PROOF--Continued

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

BLM may properly cancel a private maintenance and care agreement for wild or free-roaming horses upon receiving proof that the animals which are the subject of the agreement are in a deteriorated condition. Under such a circumstance, the burden of proving that the deteriorated condition was not caused by the adopter's own conduct, so as to permit the agreement to remain in effect, rests with the adopter.

Mary Magera, 101 IBLA 116 (Feb. 8, 1988)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan approved by the authorized officer as required by regulation at 43 CFR 3162.3-4(a). Where the record on appeal from a decision requiring an operator to replug a well discloses a material issue of fact regarding whether the well was properly plugged, the case is properly referred for an evidentiary hearing pursuant to 43 CFR 4.415.

Coleman Oil & Gas, Inc., 104 IBLA 363 (Sept. 27, 1988)

EVIDENCE--ContinuedBURDEN OF PROOF--Continued

There is an established legal presumption, which may be rebutted, that official acts of public officers discharging their official duties are regular. That presumption can be rebutted by substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a presumption of the evidence.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

CREDIBILITY

Where an application to acquire Federal land is rejected by BLM because applicant's declaration of material facts in the application demonstrates conclusively that he is not entitled to the land as a matter of law, a subsequent effort on appeal to revise, amend, or deny the facts will not be considered, absent a persuasive explanation of error in the application.

Agnes Mayo Moore, 91 IBLA 343 (Apr. 21, 1986)

Where an applicant submits evidence which supports a conclusion that two copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable

EVIDENCE--ContinuedCREDIBILITY--Continued

regulation by filing only one copy of the lease offer will be set aside.

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

Where an applicant submits evidence which supports a conclusion that two signed copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable regulation by filing only one signed copy of the lease offer will be reversed.

Bernard Silver, Frederick L. Smith, 104 IBLA 20 (Aug. 17, 1988)

CREDIBILITY OF WITNESSES

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising, the parties had interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of

EVIDENCE--Continued

## CREDIBILITY OF WITNESSES--Continued

being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay-seal alternative and agreed to perform under such alternative at no additional cost to the Government.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

An Administrative Law Judge's findings of credibility will receive considerable deference when reviewed on appeal; thus, where an Administrative Law Judge finds that the testimony of a witness in a mining claim contest has been impeached by prior inconsistent statements made in previous contests, that finding will also be accorded considerable deference.

United States v. Frank & Wanita Melluzzo, 105 IBLA 252 (Nov. 4, 1988)

## HEARSAY

Hearsay evidence is admissible as an exception to the general rule in Departmental probate of Indian trust estates when it pertains to matters of family history, relationship, and pedigree.

Estate of Henry W. George, 15 IBIA 49 (Nov. 17, 1986)

## PREPONDERANCE

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

EVIDENCE--Continued

## PREPONDERANCE--Continued

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)



EVIDENCE--ContinuedPREPONDERANCE--Continued

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

EVIDENCE--ContinuedPREPONDERANCE--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

PRESUMPTIONS

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document was mailed. Rather, BLM's denial of receipt of a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

EVIDENCE--ContinuedPRESUMPTIONS--Continued

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co., 87 IBLA 113 (May 31, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

EVIDENCE--ContinuedPRESUMPTIONS--Continued

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

EVIDENCE--ContinuedPRESUMPTIONS--Continued

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157 (Aug. 12, 1985)

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other

EVIDENCE--ContinuedPRESUMPTIONS--Continued

evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary.

Norman A. Whittaker, 89 IBLA 224 (Oct. 28, 1985)

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

Where the record does not indicate receipt of a document purportedly sent, a legal, but rebuttable, presumption exists that administrative officials did not receive the document.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

BLM may properly issue a notice of incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations with respect to an oil and gas lease, where that document is not in the record and the presumption that BLM did not lose or misplace it has not been rebutted.

Apollo Energy Inc., 94 IBLA 154 (Oct. 23, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 344 (Nov. 26, 1986)



EVIDENCE--ContinuedPRESUMPTIONS--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gittlitz, 95 IBLA 221 (Jan. 15, 1987)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department

EVIDENCE--ContinuedPRESUMPTIONS--Continued

determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

There is a presumption which exists, until the contrary is shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character is concerned.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988) 95 I.D. 49

Inclusion of a simultaneous oil and gas lease application in a lease drawing does not corroborate an assertion that a list of partners was filed with that application by the partnership/applicant sufficiently to overcome the presumption of regularity, where, under BLM's procedures, applications filed without a list of partners were not excluded from drawings and no list of partners was found in BLM's files.

JN Oil & Gas, 101 IBLA 394 (Apr. 1, 1988)

A presumption of regularity supports the official acts of public officials in the proper discharge of their duties. It may be overcome by probative evidence to the contrary.

Vicki D. Graham, 102 IBLA 38 (Apr. 11, 1988)

EVIDENCE--Continued

## PRESUMPTIONS--Continued

The presumption that the datestamp affixed to a certified mail return receipt card by a U.S. Postal Service employee was the date the item was delivered can be rebutted by an official Postal Service document showing the actual date of delivery and a statement by the Postal Service that delivery occurred on the date on the document rather than the date indicated by the return receipt card.

Enstar Corp., 102 IBLA 207 (May 10, 1988)

Neither the assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

The presumption of the regularity of official actions will stand unless evidence contradicting it is presented.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

An assessment of late payment charges by MMS cannot be affirmed if the administrative record submitted to the Board of Land Appeals by the Director, MMS, does not contain documents conclusively showing that the lessee failed to pay royalty timely. In the absence of the original payment vouchers duly date stamped to show when they were received (or other suitable proof), it

EVIDENCE--Continued

## PRESUMPTIONS--Continued

cannot be found through the presumption of regularity that they were not timely filed.  
Dugan Production Corp., 103 IBLA 362 (Aug. 11, 1988)

There is an established legal presumption, which may be rebutted, that official acts of public officers discharging their official duties are regular. That presumption can be rebutted by substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a presumption of the evidence.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. A copy of a proof of labor with the BLM serial number marked in handwriting, coupled with a statement that the original and the copy were hand delivered to BLM and a written acknowledgement by a BLM employee that the handwriting is her own, are sufficient evidence to establish that the proof of labor was timely filed at the proper BLM office.

Milton E. Kutil, 104 IBLA 396 (Oct. 5, 1988)

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

EVIDENCE--ContinuedPRESUMPTIONS--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers, in the discharge of their duties, must for reasons of public policy and under burden of proof analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

June I. Degnan (On Reconsideration), 111 IBLA 360 (Nov. 3, 1989)

PRIMA FACIE CASE

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

EVIDENCE--ContinuedPRIMA FACIE CASE--Continued

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

United States v. Bruce L. Gillette et al., 104 IBLA 269 (Sept. 13, 1988)

United States v. Bruce V. Opperman, 111 IBLA 152 (Oct. 2, 1989)

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)



EVIDENCE--Continued

## SUFFICIENCY

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

EVIDENCE--Continued

## SUFFICIENCY--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document was mailed. Rather, BLM's denial of receipt of a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

EVIDENCE--ContinuedSUFFICIENCY--Continued

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

EVIDENCE--ContinuedSUFFICIENCY--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary.

Norman A. Whittaker, 89 IBLA 224 (Oct. 28, 1985)

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

Where the record does not contain sufficient evidence to determine whether the use of certain waterways is "significant" or is for purposes of "access to publicly owned lands or between communities," a hearing will be ordered on the question of whether they are "major waterways" within the meaning of 43 CFR 2650.0-5(o).

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

EVIDENCE--ContinuedSUFFICIENCY--Continued

A person claiming ownership of wild free-roaming horses on the public lands must present evidence of ownership to the authorized officer who may issue authorization for a roundup, specifying a reasonable time to effect gathering of the animals claimed. The criterion as to reasonable time is met where BLM has recognized a claim for 5 years and has granted four extensions during that period to effect gathering. Where the successor in interest to the original claimant presented a claim to an uncertain number of progeny, remote by several generations from the animals of the original claim, BLM properly refused to recognize such claim.

Raymond G. Rosenlund, 94 IBLA 308 (Nov. 21, 1986)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

EVIDENCE--ContinuedSUFFICIENCY--Continued

BLM may properly cancel a private maintenance and care agreement for wild or free-roaming horses upon receiving proof that the animals which are the subject of the agreement are in a deteriorated condition. Under such a circumstance, the burden of proving that the deteriorated condition was not caused by the adopter's own conduct, so as to permit the agreement to remain in effect, rests with the adopter.

Mary Magera, 101 IBLA 116 (Feb. 8, 1988)

Inclusion of a simultaneous oil and gas lease application in a lease drawing does not corroborate an assertion that a list of partners was filed with that application by the partnership/applicant sufficiently to overcome the presumption of regularity, where, under BLM's procedures, applications filed without a list of partners were not excluded from drawings and no list of partners was found in BLM's files.

JN Oil & Gas, 101 IBLA 394 (Apr. 1, 1988)

Where the Bureau of Land Management has assessed treble damages for a willful trespass for the unauthorized removal of sand and gravel in excess of that stated in a contract for sale of sand and gravel, but the record is unclear how BLM computed trespass volume and the Bureau's appraised value of sand and gravel deposits is challenged, there is sufficient question of fact for the Board to exercise its discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Connie Nielson, 102 IBLA 195 (May 6, 1988)

The Bureau of Land Management may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Esther E. Lenox, 102 IBLA 224 (May 11, 1988)



EVIDENCE--ContinuedSUFFICIENCY--Continued

There is an established legal presumption, which may be rebutted, that official acts of public officers discharging their official duties are regular. That presumption can be rebutted by substantial evidence tending to show that BLM's action was not regular in a particular instance. If such a showing is made, the Board decides the case without further reference to the presumption, and the appellant must prove his case by a presumption of the evidence.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. A copy of a proof of labor with the BLM serial number marked in handwriting, coupled with a statement that the original and the copy were hand delivered to BLM and a written acknowledgment by a BLM employee that the handwriting is her own, are sufficient evidence to establish that the proof of labor was timely filed at the proper BLM office.

Milton E. Kutil, 104 IBLA 396 (Oct. 5, 1988)

Where it appears that occupancy of a homesite in Alaska began in Sept. 1983, calculation of years of occupancy must commence with that date. There is no requirement that occupancy for purposes of establishing a homesite claim pursuant to 43 U.S.C. § 687a (1982), be continuous throughout any given calendar year.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no

EVIDENCE--ContinuedSUFFICIENCY--Continued

evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

BLM may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

WEIGHT

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary

EVIDENCE--ContinuedWEIGHT--Continued

if the return channel had been properly constructed in the first place.

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987) 94 I.D. 221

EXCHANGES OF LAND

(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects--if included in this Index.)

GENERALLY

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

EXCHANGES OF LAND--ContinuedGENERALLY--Continued

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an



EXCHANGES OF LAND--ContinuedGENERALLY--Continued

exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Mendiboure Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or any interests therein if the public interest will be well served by such exchange.

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person

EXCHANGES OF LAND--ContinuedGENERALLY--Continued

who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), states that the values of lands exchanged by the Secretary under the Act either shall be equal, or if not equal, should be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

Belco Petroleum Corp., 96 IBLA 126 (Mar. 11, 1987)

Mining claims located on land which was segregated in accordance with 43 CFR 2201.1(b) from appropriation under the mining laws by publication in the Federal Register of notice of realty action proposing the land for disposal by exchange are properly declared null and void ab initio.

Amelia Marglin Whitson, 101 IBLA 1 (Jan. 20, 1988)



EXCHANGES OF LAND--ContinuedGENERALLY--Continued

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any state or of the United States. A trustee who is a citizen of the United States is not a proper exchange proponent under sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), where all beneficiaries of the trust are aliens.

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), authorizes the Secretary of the Interior to exchange public lands or any interest therein if the public interest will be well served by such exchange.

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), provides that the values of lands exchanged by the Secretary under the Act shall be equal, or if not equal, shall be equalized by the payment of money to the grantor or to the Secretary, as the circumstances require, so long as payment does not exceed 25 percent of the total value of the lands or interests transferred out of Federal ownership.

Havasu Heights Ranch & Development Corp., 102 IBLA 1 (Apr. 5, 1988)

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), is deemed to have exhausted his rights under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

Heirs of George Martinez, Heirs of Arthur Chavez, 103 IBLA 375 (Aug. 15, 1988)

EXCHANGES OF LAND--ContinuedGENERALLY--Continued

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or an interest therein, if the public interest will be well served by such exchange. Protests against an exchange are properly dismissed if the protestors do not establish that the proposed exchange would violate the Act, applicable regulations, or contravene the public interest.

A protest against approval of a proposed land exchange, pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), is properly dismissed when a protestant holding a grazing permit on the lands to be exchanged has not established that his rights under the grazing regulations would be violated, that BLM did not adequately consider the public interest, or that the lands exchanged are not of equal value.

City of Santa Fe et al., 103 IBLA 397 (Aug. 15, 1988)

FOREST EXCHANGES

A forest lieu selection right is extinguished where the base land is reconveyed to the principal, i.e., the party who originally conveyed the land to the United States. The purported agent or attorney-in-fact of the principal has no rights thereafter against the United States, even if he recorded his power of attorney prior to the reconveyance. The United States is not required to determine the rights of various putative assignees asserting a selection right.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

# FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees--if included in this Index.)

## GENERALLY

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

A determination establishing quarters rental rates which reflect reasonable rental value consistent with rates charged for comparable private housing in the surrounding community will be affirmed where the record shows the determination was made in accordance with accepted appraisal procedures pursuant to Departmental directives, and the quarters occupants have not established error in the determination.

Appeal of Patrick D. Morrissey, Nu'uese L. Punimata, Samuel L. Paul, & Robert Leonard, 7 OHA 6 (Oct. 2, 1986)

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aumiller, 94 IBLA 315 (Nov. 24, 1986)

# FEDERAL EMPLOYEES AND OFFICERS--Continued

## GENERALLY--Continued

The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)  
94 I.D. 132

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

The annual Consumer Price Index adjustment for Government-furnished quarters rental rates should be calculated from the month and year of the regional survey or reappraisal of the private rental market on which the rental rates were based.

Appeal of James E. Brooks, Roger L. Hamman, & Buddy L. Jensen, 7 OHA 124 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

FEDERAL EMPLOYEES AND OFFICERS--ContinuedGENERALLY--Continued

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price Index (CPI) is properly deferred 1 year when a rental rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. Mackie, 7 OHA 138 (Oct. 16, 1987)

FEDERAL EMPLOYEES AND OFFICERS--ContinuedGENERALLY--Continued

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

Rental rate adjustments for Government-furnished quarters will be upheld where appellant fails to submit evidence establishing error in the adjustments.

Appeal of the National Federation of Federal Employees Local #2044, 7 OHA 231 (Aug. 17, 1988)



FEDERAL EMPLOYEES AND OFFICERS--ContinuedGENERALLY--Continued

Rental rate adjustments for Government-furnished quarters will be revised where the record on appeal reveals errors which necessitate such corrective action.

In the Matter of the Rental Rate Appeal of Mr. Marvis V. Averett, 7 OHA 235 (Sept. 1, 1988)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupants allege that the rent is unjust, the burden is upon them to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeals of Employees Living at the Glenwood Ranger Station, 8 OHA 53 (Apr. 18, 1989)

In the Matter of the Quarters Rental Rate Appeals of Michael P. Whitelaw, Linda G. Brown, Joseph L. Finley, Bill Schoenleber, & Richard Arnoux, 8 OHA 74 (June 20, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that the rent is unjust, the burden is upon the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeal of Mr. James K. Steele, 8 OHA 60 (May 11, 1989)

AUTHORITY TO BIND GOVERNMENT

Reliance upon erroneous advice provided by Federal employees cannot create rights not authorized by law.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

FEDERAL EMPLOYEES AND OFFICERS--ContinuedAUTHORITY TO BIND GOVERNMENT--Continued

Where the record indicates full compliance with an earlier decision of this Board involving the same parties and issues, and the only remaining complaint is the fact that no meetings with appellants were held, the appeal will be denied; no such meetings are mandated by 41 CFR 102.7. See 4 CFR 101.8.

Appeal of Henry Mountain Resource Area Employees, II, 6 OHA 80 (Sept. 9, 1985)

Reliance on erroneous information provided by a BLM employee cannot relieve the owner of an unpatented mining claim of an obligation imposed by statute, create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

Reliance on erroneous or incomplete information given by an employee of the Department will not excuse an oil and gas operator from compliance with applicable law and regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider, and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)

93 I.D. 394

FEDERAL EMPLOYEES AND OFFICERS--ContinuedAUTHORITY TO BIND GOVERNMENT--Continued

Where a homestead entryman alleges that, based on the advice of a BLM employee, he refrained from filing a private contest pursuant to 43 CFR 4.450-1 against an entry adverse to his own, estoppel will not lie against the Government where the entryman is unable to show that he was ignorant of the true facts.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

Reliance on erroneous or incomplete information given by an employee of the Department cannot create any rights not authorized by law.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations and reliance on incomplete or incorrect information cannot create any rights not authorized by law.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

FEDERAL EMPLOYEES AND OFFICERS--ContinuedAUTHORITY TO BIND GOVERNMENT--Continued

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law.

Delores Jean DeMarrias Martineau v. Area Director, Billings Area Office, Bureau of Indian Affairs, 16 IBLA 104 (Apr. 4, 1988)

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBLA 210 (Aug. 2, 1989)

Reliance on incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.

Donald E. Stewart, 104 IBLA 48 (Aug. 23, 1988)

Failure to specifically exclude a category of leases in a Notice to Lessee or Notice to Payors stating that royalties were not required for "oil and gas used for production purposes on OCS oil and gas leases" is not affirmative misconduct that will support estoppel against the Government.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

The application of the doctrine of equitable estoppel against the Federal Government is justified only if doing so does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation.

Wyodak Resources Development Corp., 106 IBLA 339 (Jan. 12, 1989)

## FEDERAL EMPLOYEES AND OFFICERS--Continued

### AUTHORITY TO BIND GOVERNMENT--Continued

Employees of the executive branch, including BLM, have no authority to depart from the requirements of statutes dealing with public lands. All citizens are deemed to have knowledge of such statutes. Thus, even though a coal lessee was erroneously advised by BLM that his coal lease would be subject to readjustment in 1999 rather than in 1989, the Government is not stopped from readjusting the lease in 1989 as provided by statute.

Chevron U.S.A., Inc., The Pittsburgh & Midway Coal Mining Co., 108 IBLA 96 (Mar. 29, 1989)

### CONFLICT OF INTEREST

Appellant did not establish that the rejection of his bid on a timber sales contract involved a conflict of interest on the part of a Bureau of Indian Affairs employee, but the allegation warrants discussion in the decision on remand.

Earl Vielle v. Area Director, Billings Area Office, Bureau of Indian Affairs, 15 IBIA 40 (Oct. 30, 1986)

### INTEREST IN LANDS

Location of a mining claim is a purchase of public land within the meaning of 43 U.S.C. § 11 (1982) and the claim may be declared void where it is shown that the locator's spouse who is an employee of the Bureau of Land Management (BLM) has a direct or indirect interest in the claim because "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

A mining claim is properly declared to be void ab initio, in accordance with 43 CFR 20.735-24, where the locator is the spouse of a BLM employee and the mining claim is located on land administered or controlled by the U.S. Department of the Interior.

Because the Department of the Interior retains control over the validity of mining claims on U.S. Forest Service lands administered by the Department of Agriculture, location of mining claims by the

## FEDERAL EMPLOYEES AND OFFICERS--Continued

### INTEREST IN LANDS--Continued

spouse of a BLM employee on such lands is prohibited by 43 CFR 20.735-24.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)  
92 I.D. 83

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976  
(See also Hearings, Rights-of-Way--if included in this Index.)

### GENERALLY

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, in amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4(b).

Joe Ostrenger, Jack Stacy, 94 IBLA 229 (Nov. 10, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GENERALLY--Continued

Where, in response to an inquiry from BLM regarding the exact situs of a mining claim, the claimant submits a professional survey map, along with a copy of a master title plat upon which the location of the claim has been depicted, BLM may rely on those documents to determine the location of the mining claim.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

ASSESSMENT WORK

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Samuel A. Wright, 86 IBLA 286 (May 13, 1985)

J. E. Stevens, 86 IBLA 291 (May 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

When a claimant fails to timely file an affidavit of assessment work or notice of intent to hold, the Board lacks authority to excuse lack of compliance, extend the time for compliance, or afford any relief from the statutory consequences.

Mine Management Corp., 88 IBLA 311 (Sept. 18, 1985)

The failure of a holder of a millsite claim which has been properly recorded under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), to file an annual notice of intention to hold the millsite is a curable defect. Where the Bureau of Land Management fails to notify a millsite claimant of a defective filing, and to request curative data prior to the time annual notices are submitted in subsequent years, BLM has effectively waived the defective filing and may not declare the millsite claim abandoned and void because of the absence of that document from the file.

James J. Kohring, 89 IBLA 345 (Nov. 14, 1985)

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, *i.e.*, on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, *i.e.*, on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM and there is no evidence that the claimant filed any other document with BLM on that date serves to rebut the presumption of non-filing which is customarily applied where BLM's records indicate a required filing has not occurred. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates that, more likely than not, a required document was in fact received by BLM.

Richard A. Willers, 101 IBLA 106 (Feb. 2, 1988)

Evidence that a mining claimant possesses an acknowledgment receipt card with an attachment purportedly listing those claims for which annual filings were received during the calendar year in question and the fact that BLM does not challenge her characterization of the evidence serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not been made.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedASSESSMENT WORK--Continued

BLM's allegedly inconsistent conduct in acknowledging receipt of affidavits of assessment work does not provide the corroboration necessary to overcome the presumption that an administrative official has properly discharged his duties and not lost or misplaced legally significant documents submitted for filing.

Willis B. Grossardt, 102 IBLA 212 (May 10, 1988)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filing must be made within each calendar year, i.e., on or after Jan. 1, and on or before Dec. 30. Failure to file within the calendar year results in the claim being extinguished and therefore abandoned and void. In order to constitute a notice of intent to hold, a document filed with BLM must satisfy the requirements of 43 CFR 3833.2-3.

Donald L. Howard, Lorena L. Howard, & Ronald C. Howard, 104 IBLA 374 (Sept. 27, 1988)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void.

Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made.

Under 43 CFR 3833.2-4, a mining claimant is excused from filing evidence of annual assessment work or a notice of intention to hold his claim only if a proper application for a mineral patent is filed and

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedASSESSMENT WORK--Continued

the final certificate has been issued. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements.

BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Gordon B. Copple, Estate of Janet Copple, Estate of Gust E. Svensson, Jr., 105 IBLA 90 (Oct. 20, 1988) 95 I.D. 219

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

ASSESSMENT WORK--Continued

this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

Upon receipt in 1986 of an affidavit alleging the performance of labor and improvements as annual assessment work for 1985, BLM should have notified the mining claimant that such affidavit was deficient and allowed the claimant the opportunity to submit a proper document.

James T. Briggs, 112 IBLA 130 (Nov. 30, 1989)

BLM has no affirmative obligation to send a notice to remind a mining claimant of the need to make annual filings or to contract a mining claimant to ascertain which claims are intended to be included in the annual filings required by 43 U.S.C. § 1744 (1982).

Havilah Gold Co., Inc., 112 IBLA 160 (Dec. 11, 1989)

CALIFORNIA DESERT CONSERVATION AREA

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CALIFORNIA DESERT CONSERVATION AREA--Continued

vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

CONVEYANCES

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested administrative costs as required by 43 CFR 2720.1-3(b)(1), the application is properly rejected.

Niles H. Thim Corp., 93 IBLA 128 (July 29, 1986)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CONVEYANCES--Continued

date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

A BLM decision to transfer the administration of a right-of-way to a patentee of Federal land will be affirmed as a proper exercise of discretion where it is shown that the public interest is best served by the transfer of administration.

City of Las Cruces, 105 IBLA 50 (Oct. 17, 1988)

Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining claims located on such lands are properly declared null and void ab initio.

Golden Reward Mining Co., 111 IBLA 217 (Oct. 16, 1989)  
96 I.D. 452

CORRECTION OF CONVEYANCE DOCUMENTS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Minton, Marylee Minton, 91 IBLA 108 (Mar. 14, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CORRECTION OF CONVEYANCE DOCUMENTS--Continued

BLM may properly reject an application to correct a homestead patent to include certain land where, although the original patentee may have intended to enter that land, the applicant acquired the patented homestead with a specific disclaimer of any transfer of the land and, thus, has no equitable interest in the land.

Arthur Warren Jones et al., 97 IBLA 253 (May 13, 1987)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and a patent may not be corrected without the consent of the patentee.

Where a Government patent provides that land is conveyed subject to existing access, a dispute between private parties regarding a right of access cannot be adjudicated by BLM, and correction of the patent by BLM to define more clearly that access, against the wishes of the patentee, is improper.

Lone Star Steel Co., et al., 101 IBLA 369 (Mar. 29, 1988)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, in correcting errors under this statutory authority, only mistakes of fact may be corrected, not mistakes of law.

Before action may be taken to correct a patent pursuant to 43 U.S.C. § 1746 (1982), the applicant for correction must show that an error in fact was made. Once the existence of an error in fact is shown, consideration may be given to matters of equity and justice which warrant amendment of the patent.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

CORRECTION OF CONVEYANCE DOCUMENTS--Continued

Absent exceptional circumstances, the Department cannot amend a patent to include lands that were not subject to entry by the original entryman.

Shoshone & Arapahoe Tribes, 102 IBLA 256 (May 23, 1988)  
95 I.D. 64

The Secretary has the authority to issue corrective patents when necessary to eliminate errors. A party seeking a corrective patent initiates the proceeding by filing an application asserting ownership of lands described in and based upon a patent or other document containing an alleged error. However, when the error does not lie in the patent or other document under which the applicant is asserting ownership, but lies in a patent issued to another party, the Secretary does not have authority to correct the other party's patent.

Genaro M. Roybal, 107 IBLA 75 (Jan. 30, 1989)

DISCLAIMERS OF INTEREST

Notwithstanding a finding that the United States has no right, title, or interest in or to the lands at issue, an application by the owner of record for a recordable disclaimer of interest by the United States pursuant to 43 U.S.C. § 1745 (1982) must be rejected where the record shows that more than 12 years have elapsed since the owner/applicant and his predecessors knew or should have known of the alleged claim attributed to the United States, because 43 CFR 1864.1-3 mandates rejection of such applications.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

DISCLAIMERS OF INTEREST--Continued

the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)  
93 I.D. 66

A decision rejecting application for a recordable disclaimer of mineral interest will be affirmed on appeal where the record shows that more than 12 years have elapsed between the time the owner-applicant knew or should have known of the alleged claim attributed to the United States and the date application for disclaimer was made to the Department. 43 CFR 1864.1-3.

T. Jack Foster Trust A, 111 IBLA 392 (Nov. 8, 1989)

EXCHANGES

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography, the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp.,  
85 IBLA 224 (Feb. 28, 1985)

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Where BLM denies a request by a private land owner for access across Federal lands selected in a private exchange proposal on the basis that historical access to the private lands has been across other private lands not associated with the exchange and that the requested access would provide no public benefit, such a determination will be upheld where the one seeking access fails to establish error in the BLM determination.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Mendiboure Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any state or of the United States. A trustee who is a citizen of the United States is not a proper exchange proponent under sec. 207 of the Federal Land Policy and Management Act

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

EXCHANGES--Continued

of 1976, 43 U.S.C. § 1717 (1982), where all beneficiaries of the trust are aliens.

Havasu Heights Ranch & Development Corp., 102 IBLA 1 (Apr. 5, 1988)

A protest against approval of a proposed land exchange, pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), is properly dismissed when a protestant holding a grazing permit on the lands to be exchanged has not established that his rights under the grazing regulations would be violated, that BLM did not adequately consider the public interest, or that the lands exchanged are not of equal value.

City of Santa Fe et al., 103 IBLA 397 (Aug. 15, 1988)

GRAZING LEASES AND PERMITS

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

HEARINGS

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

HEARINGS--Continued

law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)<sup>94 I.D. 132</sup>

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

San Juan County, 102 IBLA 155 (Apr. 29, 1988)<sup>95 I.D. 61</sup>

LAND USE PLANNING

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedLAND USE PLANNING--Continued

and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35  
96 IBLA 19 (Feb. 26, 1987)

A BLM decision to designate certain roads within the King Range National Conservation Area as open to unrestricted or limited vehicle use by the general public will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. However, where a portion of the King Range has been designated a wilderness study area, relevant factors for consideration of whether to open the area to off-road vehicle use must include whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the road opening because it reveals the threat of unnecessary degradation of the natural and cultural resources, the decision will be reversed.

California Wilderness Coalition et al., 101 IBLA 18 (Jan. 25, 1988)

In a petition for reconsideration of a Board decision closing roads within the King Range Wilderness Study Area to off-road vehicle use, BLM offered new evidence to show that it increased its law enforcement capability in the area and has purchased property in order to better control illegal off-road vehicle use. In consideration of the new evidence tending to show that BLM will be better able to control off-road traffic as a result, the Board's prior decision will be vacated in part where the evidence shows that these measures will protect

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedLAND USE PLANNING--Continued

against the impact of off-road vehicle use on the natural and cultural resources of the wilderness study area.

California Wilderness Coalition et al. (On Reconsideration), 105 IBLA 196 (Nov. 2, 1988)

Approval or amendment of a resource management plan are not actions appealable to the Board of Land Appeals. However, any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Albert Yparraquirre, 105 IBLA 245 (Nov. 4, 1988)

Issuance of a recreational permit allowing motor vehicle travel in Arch Canyon without first amending an existing Management Framework Plan which prohibited such usage was contrary to provisions of 43 CFR 1610.8. Unless the Management Framework Plan were first amended to allow such travel, the prohibited usage could not be permitted.

Adjudication of an application for a recreational travel permit which found the proposed travel would take place on a public road right-of-way established pursuant to the Act of July 26, 1866, must be vacated where the record does not support a finding there is such a road within the permitted area of travel.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LEASES

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

San Juan County, 102 IBLA 155 (Apr. 29, 1988) 95 I.D. 61

An appraisal of fair market rental value for a nonmineral lease site will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charge is excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Gerald L. & Ruby A. Overstreet, 112 IBLA 211 (Dec. 19, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) <sup>94</sup> I.D. 132

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle observed trials event when there is evidence that the proposed use would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

Southern California Trials Ass'n, 104 IBLA 141 (Sept. 2, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

It was proper for BLM to place the holder of a special recreation permit for commercial use of a wild and scenic river on probationary status. The evidence established that the permittee gave an authorized officer of BLM inaccurate information on a trip ticket. To do so was a specified violation of the permit stipulations, and the sanction imposed by BLM was called for in the permit stipulations.

Rogue Excursions Unlimited, Inc., 104 IBLA 322 (Sept. 20, 1988)

Issuance of a recreational permit allowing motor vehicle travel in Arch Canyon without first amending an existing Management Framework Plan which prohibited such usage was contrary to provisions of 43 CFR 1610.8. Unless the Management Framework Plan were first amended to allow such travel, the prohibited usage could not be permitted.

Adjudication of an application for a recreational travel permit which found the proposed travel would take place on a public road right-of-way established pursuant to the Act of July 26, 1866, must be vacated where the record does not support a finding there is such a road within the permitted area of travel.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

BLM properly denied approval of two free-use applications for sand and gravel aggregate excavation within a wilderness study area where impacts of the excavation could not be rendered substantially unnoticeable before a final wilderness designation was scheduled to be made pursuant to 43 U.S.C. § 1782 (1982).

California Dept. of Transportation, 111 IBLA 251 (Oct. 25, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS

The surface management regulations at 43 CFR Subpart 3809 implement the mandate of sec. 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. A decision of BLM requiring a mining claimant to operate under an approved plan of operations on the basis that mining operations would cause a cumulative surface disturbance in excess of 5 acres during a calendar year will be affirmed where appellant fails to sustain the burden of showing that 5 acres or less is involved. Although the regulations governing reclamation of disturbed areas permit deferral of reclamation for legitimate mining purposes, unreclaimed surface disturbance from a prior year's operation is properly included in the acreage computation for purposes of determining whether a plan of operations is required.

Differential Energy, Inc., 99 IBLA 225 (Oct. 16, 1987)

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Approval of mining plans of operations for a cyanide leaching operation may be properly rescinded where the plans are shown to have been approved in error because an assumption was made that an adequate supply of water was available which did not in fact exist.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

Designations as to areas and trails closed and limited to off-road vehicle use made under the authority of Exec. Order No. 11644, amended by Exec. Order No. 11989, and the regulations at 43 CFR Part 8340, are not determinative in reviewing a plan of operations which proposes to use such an area or trail for access to mining claims. Under the regulations, approval of a plan of operations will create an

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

exception allowing use of an off-road vehicle in the area or on the trail.

During the period a wilderness study area is being reviewed so that the Secretary may make his recommendation to the President as to the area's suitability or nonsuitability for preservation as wilderness, and until Congress has reached its decision on the matter, BLM is required to manage the lands so as not to impair their suitability for preservation as wilderness. When a plan of operations is rejected by BLM because the proposed activity will impair the area's suitability for preservation as wilderness, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Manville Sales Corp., 102 IBLA 385 (June 17, 1988)

After receiving assertions by local Indians that an area being considered for a mining exploration project was within an area of historical and cultural significance to the Indians, BLM undertook an investigation which included a search of historical records, a class III cultural inventory report, and consultation and joint field examination with the Indians. Based upon the information obtained, BLM determined that the project area was not within a district or site included in or eligible for inclusion in the National Register of Historic Places, and that the mining exploration at the project area would not have an effect on the asserted historical and cultural characteristics of the area. It was proper for BLM to conclude, based on its findings, that a mining plan of operations could properly be approved in accordance with the Surface Management Regulations in 43 CFR 3809 and sec. 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470(f) (1982).

When recommending that the State of Montana approve a mining plan of operations pursuant to the Surface Management Regulations in 43 CFR 3809 and a memorandum of understanding between BLM and the State of Montana, BLM did not fail to comply with the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982). The record shows that BLM made a good faith effort to obtain and consider the views of the Indians and determined, based on the record, that the



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PLAN OF OPERATIONS--Continued

operations set out in the mining plan would not unnecessarily interfere with American Indian religious values and practices and would not prevent the Indians from access to their religious sites. BLM's action was in accord with the policy and requirements of AIRFA.

The Blackfeet Tribe, 103 IBLA 228 (July 26, 1988)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. However, if mining operations on such lands may continue, if the operations are occurring in the same manner and degree as on Oct. 21, 1976. A mining plan of operations for claims located after Oct. 21, 1976, even though those claims embrace the same lands covered by different claims located prior to Oct. 21, 1976, cannot be considered to be a continuation of any operations undertaken pursuant to the previous claims and cannot qualify for the less restrictive management standard.

Approval of a mining plan of operations for post-FLPMA mining claims within a wilderness study area may properly be denied when planned road building and blasting impacts could not be rendered substantially unnoticeable before a final wilderness designation decision is made.

Eugene Mueller, 103 IBLA 308 (Aug. 4, 1988)

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

The Supreme Court has definitively established in United States v. Locke, 53 U.S.L.W. 4433 (Apr. 2, 1985), that the provisions of sec. 314 of FLPMA, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

where a mining claimant apparently inadvertently omits the serial number of two claims from the affidavit of annual labor and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2.

Arley R. Taylor, 86 IBLA 283 (May 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Charles H. Hagerty, 87 IBLA 23 (May 21, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, is constitutional and does not result in a deprivation of due process of law.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

Failure to file evidence of annual assessment work in calendar year 1981 for a mining claim located before Oct. 21, 1976, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2-1(a) (1981), constitutes abandonment of the claim and renders it void. Personal delivery of such evidence after regular business hours on Dec. 30, 1981, does not constitute compliance with the recordation requirement where the document is deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day, Dec. 31.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

BLM may properly declare an unpatented mining claim located prior to 1982 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file either evidence of annual assessment work or a notice of intention to hold the claim with BLM on or before Dec. 30, 1982.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co.,  
87 IBLA 113 (May 31, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

When Congress enacted sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), it intended to distinguish those claims for which timely filings were not made. Evidence of subjective intent to hold the claims is not relevant, as the failure to file an affidavit of assessment work or notice of intent to hold in a timely manner, in and of itself, causes the claim to be lost. The statute specifically provides that failure to comply with applicable filing requirements leads automatically to loss of the claim.

For the purposes of 43 CFR 3833.2-1, "timely filing" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law, in an envelope bearing a clear postmark affixed by the United States Postal Service bearing a date within the period prescribed by law. When documents submitted for filing have been lost in the mail and thus not received by BLM, such loss must be borne by the claimant.

Paul E. Hammond, 87 IBLA 139 (June 10, 1985)

To comply with 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file his evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of BLM. By regulation 43 CFR 3833.0-5(m), the Department has considered such documents to be timely filed if placed in an envelope postmarked by the United States Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the envelope containing the necessary documentation is postmarked Dec. 31, the claim is properly declared abandoned and void.

J. W. Doyle, 87 IBLA 158 (June 11, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may not declare an unpatented mining claim abandoned and void for failure to file a notice of intention to hold the claim with both the local recording office and BLM on or before Oct. 22, 1979, where the claimant has already filed within the 3-year period following Oct. 21, 1976, pursuant to sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), thereby initiating the statutory requirement to file prior to Dec. 31 of each year thereafter.

Bernice Sheldon, 87 IBLA 161 (June 11, 1985)

In United States v. Locke, 105 S. Ct. 1785 (1985), the United States Supreme Court held that sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), is constitutional. Sec. 314 provides that upon the failure of a mining claimant to timely file either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively presumed to be abandoned and void. Therefore, a mining claimant is not deprived of due process where his claim is rendered abandoned and void for failure to timely make the required filing.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Golden Triangle Exploration Co., 87 IBLA 191 (June 13, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of an unpatented mining claim located prior to Oct. 21, 1976, to file evidence of annual assessment work or notice of intention to hold with the Bureau of Land Management on or before Oct. 22, 1979, and on or before Dec. 30 of each year thereafter. This requirement is mandatory and the failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and render the claim void.

Glenn & Barbara Kroshus, 87 IBLA 213 (June 18, 1985)

Arne W. Murto, 88 IBLA 19 (July 1, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

BLM may properly declare an unpatented mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim for 1982 prior to Dec. 31, 1982.

Ronald H. Vowell et al., 87 IBLA 293 (June 25, 1985)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

Gloria T. Bruce, C. Vince Bruce, 87 IBLA 338 (June 26, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

William J. Fairse, Glenn Fairse, 88 IBLA 22 (July 2, 1985)

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on Federal lands must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Pursuant to 43 CFR 3833.0-5(m), a proof of labor or notice of intention to hold will not be deemed as timely filed where it is mailed in an envelope bearing a clearly dated postmark affixed by the United States Postal Service prior to Dec. 31, within the period prescribed by law, but is not delivered to the proper BLM office by Jan. 19 immediately following.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

A decision declaring an unpatented mining claim located after Oct. 21, 1976, abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be affirmed where the affidavit of assessment work due on or before Dec. 30, 1983, although filed prior to Jan. 19, 1984, was not received in an envelope postmarked prior to Dec. 31, 1983, such that the claimant can take advantage of 43 CFR 3833.0-5(m).

David H. Holt, 88 IBLA 36 (July 9, 1985)

BLM may properly declare an unpatented mining claim located in 1977 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year following the calendar year in which the claim was located.

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may properly declare an unpatented mining claim filed for recordation in 1979 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner fails to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 31 of calendar years 1980, 1981, and 1982.

Walter E. & Ruth Roman, 88 IBLA 123 (Aug. 1, 1985)

BLM may properly declare unpatented mining claims abandoned and void pursuant to 43 U.S.C. § 1744 (1982), when the claimant fails to file prior to Dec. 31 of any calendar year either evidence of annual assessment work or a notice of intent to hold.

Mine Management Corp., 88 IBLA 311 (Sept. 18, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of Title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

The Supreme Court has definitively established in United States v. Locke, 105 S. Ct. 1785 (1985), that the provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, which provide that, upon the failure of a mining claimant to timely file annually either evidence of the performance of annual assessment work or a notice of intention to hold a mining claim, the claim is conclusively deemed abandoned and void, are constitutional, and do not result in a deprivation of due process of law.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) within the prescribed time constitutes abandonment of the mining claim.

Karl Peterson, 89 IBLA 141 (Oct. 1, 1985)

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), a holder of a claim located prior to Oct. 21, 1976, must file evidence of assessment work or a notice of intention to hold the claim no later than Oct. 22, 1979, and each year following the initial filing, and the holder of a claim located after Oct. 21, 1976, must make a similar filing commencing in the calendar year following the date of location and within each calendar year thereafter.

"Timely filed." Under 43 CFR 3833.0-5(m), for the purpose of determining whether the annual filing mandated by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is timely filed, the phrase "timely filed" is defined to mean "being filed within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law."

Buck Wilson, 89 IBLA 143 (Oct. 1, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Norman A. Whittaker, 89 IBLA 224 (Oct. 28, 1985)

Unpatented mining claims located upon land tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the claims. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Ed Bilderback et al., 89 IBLA 263 (Nov. 6, 1985)

Sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), requires the owner of a mining claim located on or before Oct. 21, 1976, to file either a notice of intention to hold or evidence of performance of annual assessment work on the claim with BLM on or before Oct. 22, 1979, and prior to Dec. 31 of each year after the initial filing. For a claim located after Oct. 21, 1976, the statute requires the owner to file either of the instruments prior to Dec. 31 of each year following the calendar year the claim was located. These requirements are mandatory and failure to comply is deemed conclusively



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

to constitute an abandonment of the claim by the owner and renders the claim void.

Thorvald W. Hansen, 90 IBLA 159 (Dec. 30, 1985)

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alamin Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Instruments required to be filed with BLM by 43 U.S.C. § 1744(a) (1982), must identify the claim or claims for which they are filed by giving the correct claim name, the correct BLM assigned claim number, or a description of each claim sufficient to locate it on the ground.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recordation office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Robert C. Bishop et al., 93 IBLA 199 (Aug. 18, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Lands tentatively approved for conveyance to the State of Alaska were legislatively conveyed to the State by sec. 906 of the Alaska National Interest Lands Conservation Act, and consequently the Department may no longer adjudicate the validity of unpatented mining claims located on such lands. Since sec. 314 of the Federal Land Policy and Management Act of 1976 applies only to public lands of the United States, the filing and recording requirements of sec. 314 do not apply to such legislatively conveyed lands, and the statutory filing requirements may not be relied upon to invalidate or otherwise determine the status of unpatented mining claims located on such conveyed lands.

Elizabeth S. Hjellen et al., 93 IBLA 203 (Aug. 20, 1986)

Marv Lou Redmond, 95 IBLA 379 (Feb. 20, 1987)

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the requirement that it be filed

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

An unpatented mining claim located after Oct. 21, 1976, is properly declared abandoned and void where the claimant failed to file either an affidavit of annual assessment work, a notice of intention to hold the claim, or a detailed report under 30 U.S.C. § 28-1 (1982) prior to Dec. 31, regardless of whether the claimant was entitled to or granted deferment of annual assessment work.

Marcus D. Schneider, 94 IBLA 239 (Nov. 12, 1986)

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aumiller, 94 IBLA 315 (Nov. 24, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, *i.e.*, on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Although 43 U.S.C. § 1744(a) does not prescribe the form a notice of intention to hold a mining claim must take, not every document sent to BLM from which intent might be inferred is sufficient. Rather, whatever the form of the instrument, it must be filed with BLM as a notice of intent. It must indicate that the claim owner continues to have an interest in the claim. It must also be a copy of the document which was or will be recorded with the county or local recorder's office. The instrument must also include a description of the location of the mining claim sufficient to locate the claimed lands on the ground, the BLM assigned claim number, or the name of the claim.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of any calendar year following the first filing of such evidence or notice.

Not every document filed with BLM from which intent might be inferred is sufficient to meet the statutory and regulatory requirements for notices of intention to hold mining claims. Such a document must be filed as a notice of intent and meet those requirements.

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982) on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

Departmental regulation 43 CFR 3833.0-5(m), promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S. 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of an unpatented mining claim located prior to Oct. 21, 1976, to file evidence of annual assessment work or notice of intention to hold with the Bureau of Land Management on or before Oct. 22, 1979, and on or before Dec. 30 of each year thereafter. This requirement is mandatory and the failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and render the claim void.

Although 43 U.S.C. § 1744(a) does not prescribe the form a notice of intention to hold a mining claim must take, not every document sent to BLM from which intent might be inferred is sufficient. Whatever the form of the instrument, it must be filed with BLM as a notice of intent to hold, indicating that the claim owner continues to have an interest in the claim. The instrument must also include a description of the location of the mining claim sufficient to locate the claimed lands on the ground, the BLM assigned claim number, or the name of the claim. It must also be evident that a copy of the document was or will be recorded with the county or local recorder's office.

R. H. Gunn, 98 IBLA 104 (June 15, 1987)

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), requires the owner of a lode or placer mining claim located prior to its enactment on Oct. 21, 1976, to file with BLM "within the three-year period following the date of the approval of this Act and prior to Dec. 31 of each year thereafter," a copy of either a notice of intention to hold the mining claim or an affidavit of assessment work. The phrase "each year thereafter" refers to the years following the calendar year in which either evidence of assessment work or a notice of intention to hold the claim was first filed.

In order for a document filed with BLM to qualify under 43 U.S.C. § 1744(a) (1982) as a notice of intention to hold a mining claim, the document must have been filed with BLM as a notice of intent, must be a copy of a document that was or will be filed with the local jurisdiction where the claim's location certificate was recorded, and must identify the claim

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

by name, by BLM-assigned claim number, or by a description sufficient to locate the claim on the ground.

L & S Mines, 98 IBLA 123 (June 19, 1987)

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

Sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1, require the owner of an unpatented mining claim located on public land to file evidence of assessment work performed or a notice of intention to hold the mining claim with the proper BLM office prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the mining claim.

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim, because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

With respect to an unpatented mining claim located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either a notice of intention to hold the claim or evidence of assessment work both in the local recording office where the notice of location is recorded and in the proper office of BLM prior to Dec. 31 of the year following the calendar year in which the claim was located, as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Oliver B. Kilroy, 99 IBLA 33 (Aug. 31, 1987)

Where a mining claimant inadvertently omits the name and serial number of unpatented mining claims from the notice of intention to hold and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2. Although a filing may be supplemented by subsequent submission of information not required by statute without a statutory presumption of abandonment, there is no authority for amendment of the notice of intention to hold to include a previously omitted claim after the filing deadline.

Ethel Bilotte, 99 IBLA 159 (Sept. 29, 1987)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

The regulation at 43 CFR 3833.2-1(a)(1), governing the filing of an affidavit of assessment work pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), provides that the affidavit should reflect the BLM serial numbers of the claims covered by the affidavit. A typographical error in one of the serial numbers of a series of claims identified in a timely filed affidavit will not support a finding of abandonment where the book and page of recordation of the claims previously provided to BLM is also identified in the affidavit and is adequate to identify the claims described.

Homer F. Wilson, 101 IBLA 70 (Jan. 29, 1988)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM and there is no evidence that the claimant filed any other document with BLM on that date serves to rebut the presumption of non-filing which is customarily applied where BLM's records indicate a required filing has not occurred. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates that, more likely than not, a required document was in fact received by BLM.

Richard A. Willers, 101 IBLA 106 (Feb. 2, 1988)

Sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and the applicable Departmental regulations (43 CFR Subpart 3833), require that the owner of an unpatented mining claim, located on public land prior to Oct. 21, 1976, must file, with the local recording office where the claim is recorded and with the proper BLM office, on or before Dec. 30 in each calendar year following the first filing of either evidence of annual assessment work or a notice of intention to hold the claim, one of those documents. Failure to file the necessary document timely in either office results in a conclusive presumption that the claim has been abandoned

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

and renders the claim void. 43 U.S.C. § 1744(c) (1982); 43 CFR 3833.4(a).

Enfield Resources, 101 IBLA 120 (Feb. 8, 1988)

A notice of intent to hold a mining claim, made in compliance with 43 U.S.C. § 1744(a) (1982), must be a copy of the document which or will be recorded with the county or local recording office. A document styled as a notice of intent which is not intended to be so recorded is not a notice of intent within the meaning of 43 U.S.C. § 1744(a).

The filing of a defective instrument is not sufficient to satisfy the recordation requirements of 43 U.S.C. § 1744 (1982).

Joseph L. Frankmore, 101 IBLA 202 (Feb. 22, 1988)

Where it appears that a specifically identified mining claim has been recorded twice with BLM by the same locators, the second time as a relocation, a finding that the claim as relocated is abandoned and void for failure to file evidence of assessment work, on the ground the proof of labor filed with BLM referred only to the serial number assigned to the earlier recordation, will be reversed in the absence of evidence the relocation was adverse to the earlier location rather than an amended location which relates back.

Edward E. Ellis, 101 IBLA 272 (Mar. 10, 1988)

Evidence that a mining claimant possesses an acknowledgment receipt card with an attachment purportedly listing those claims for which annual filings were received during the calendar year in question and the fact that BLM does not challenge her characterization of the evidence serves to rebut the presumption



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

of nonfiling which is customarily applied where BLM's records indicate a required filing has not been made.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)

BLM's allegedly inconsistent conduct in acknowledging receipt of affidavits of assessment work does not provide the corroboration necessary to overcome the presumption that an administrative official has properly discharged his duties and not lost or misplaced legally significant documents submitted for filing.

Willis B. Grossardt, 102 IBLA 212 (May 10, 1988)

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The grace period afforded by 43 CFR 3833.0-5(m) extends only to those documents delivered by the U.S. Postal Service, and does not apply to a document delivered to BLM by a private courier.

Victor Shepherd, 102 IBLA 334 (June 3, 1988)

BLM properly declares a mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), where a mining claimant files a single affidavit of assessment work for a group of claims but omits the name and serial number of a claim and the affidavit provides no other means of identifying the omitted claim.

A decision declaring a mining claim to be abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be reversed if the mining claimant had filed an affidavit of assessment work for a group of claims that properly listed the BLM

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE  
OF INTENTION TO HOLD MINING CLAIM--Continued

serial number for the claim at issue even though the name of the claim was not stated.

George M. Wilk Wilkinson, 103 IBLA 121 (July 19, 1988)

In the case of mining claims located prior to Oct. 21, 1976, failure to file copies of proofs of labor or notices of intent to hold the claims in the proper BLM office on or before Oct. 22, 1979, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), and 43 CFR 3833.2-1(a) (1979), renders the claims abandoned and void.

Henry E. Krizman et al., 104 IBLA 9 (Aug. 15, 1988)

Failure to file affidavits of assessment work or notice of intent to hold, prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Donald E. Stewart, 104 IBLA 48 (Aug. 23, 1988)

Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made.

Under 43 CFR 3833.2-4, a mining claimant is excused from filing evidence of annual assessment work or a notice of intention to hold his claim only if a proper application for a mineral patent is filed and the final certificate has been issued. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements.

BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

need to make annual filings required by 43 U.S.C. § 1744 (1982).

Gordon B. Copple, Estate of Janet Copple, Estate of Gust E. Svensson, Jr., 105 IBLA 90 (Oct. 20, 1988)  
95 I.D. 219

Failure to file documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976 causes a mining claim to become abandoned and void.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

Where an annual filing document has been submitted to an office not authorized to receive it, the filing requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), have not been complied with. As a claimant is responsible to comply with the statute, and the Department is without authority to excuse a lack of compliance, the failure of an office receiving misdirected filing to promptly notify the claimant of the situation does not waive the statutory consequences for failure to timely file the required document in the proper office.

Gold Leaf Enterprises, 105 IBLA 282 (Nov. 7, 1988)

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and acceptance of mineral patent, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

The owner of an unpatented mining claim located on public land is required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 to file evidence of assessment work performed or a notice of intention to hold with the proper BLM office on or before Dec. 30 of each calendar year. By regulation 43 CFR 3833.0-5(m), the Department considers such documents to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows compliance with that regulation, a BLM decision declaring a claim abandoned and void based on an untimely filing must be reversed.

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

Under 43 U.S.C. § 1744(a) (1982), as implemented by the provisions of 43 CFR 3833.2-3, the mining claim recordation document filed with the Bureau of Land Management by a mining claimant as a notice of intention to hold the claim must be "an exact legible reproduction or duplicate, except microfilm, of an instrument" which was or will be filed for record with the local recording district. There is no evidence in this case that the documents cited by claimant as notice of intention to hold constitute copies of documents he had filed or intended to file with the local recording district.

Albert H. Corliss, 108 IBLA 152 (Apr. 7, 1989)

The conclusive presumption of abandonment for failure to comply with the recordation requirements of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is self-operative and does not depend upon any act or decision of an administrative official. Where a claim is omitted from the express listing of a group of claims for which annual assessment work was performed but was depicted on a map accompanying the affidavit of assessment work, it is wholly a matter of conjecture whether the claim not specifically identified was intended to be listed as the object of assessment work expenditures.

Douglas C. Liechty, 108 IBLA 247 (Apr. 24, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Where a mining claimant files timely an affidavit of assessment work with BLM as required by sec. 314 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744(a) (1982)), which is not the affidavit of assessment required to be filed under 43 CFR 3833.2-1, it is a curable defect, and a mining claimant is entitled to notice and a reasonable opportunity to submit the precise instrument.

Where an affidavit of assessment work timely filed with BLM does not include BLM serial numbers as required by 43 CFR 3833.2-2(a)(1), the failure to provide such is curable pursuant to 43 CFR 3833.4, and will not be deemed to invalidate an otherwise sufficient filing under 43 U.S.C. § 1744(a)(2) (1982), absent a showing that the claimant has been given notice and 30 days within which to cure the defect.

Thomas A. Alexander, 108 IBLA 347 (May 12, 1989)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where a notice of intention to hold or evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The filing of a quitclaim deed relating to a mining claim does not, standing alone, constitute a notice of intention to hold the mining claim. Such a deed merely evidences present ownership, not an intention to hold in the future.

George McGowan, 109 IBLA 1 (May 22, 1989)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The provisions of 43 CFR 3833.4(b) apply to the filing of supplemental information not specifically called for in 43 U.S.C. § 1744 (1982), and the filing of notices of intention to hold millsites and tunnel site claims. The latitude set out in 43 CFR 3833.4(b) is not available if no annual filing has been made for a lode or placer mining claim, and, in such case, the Department is without authority to allow a 30-day period after notice for a claimant to file the required documents.

David R. Jacques, 109 IBLA 69 (May 30, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period,

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

Where substantial compliance is a prerequisite for the invocation of equitable adjudication, the principle is not applicable to a mining claim deemed abandoned and void for failure to timely submit the annual filing required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), because, as the Supreme Court in Locke v. United States, 471 U.S. 84 (1985), held, there is no possibility of substantial compliance where the claimant has failed to comply with the deadline established by Congress. Further, the fact that Congress made sec. 314 self-operative and did not provide the Department with the authority to waive the statutory consequences for failure to comply, dispels the view that Congress intended for a claim deemed abandoned and void to be eligible for reinstatement under some other avenue.

Basic Rock & Sand, Inc. (On Reconsideration), 110 IBLA 1 (July 5, 1989)

An unpatented mining claim is properly declared abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

Doyle C. Cape, 110 IBLA 16 (July 6, 1989)

Upon receipt in 1986 of an affidavit alleging the performance of labor and improvements as annual assessment work for 1985, BLM should have notified the mining claimant that such affidavit was deficient and allowed the claimant the opportunity to submit a proper document.

James T. Briggs, 112 IBLA 130 (Nov. 30, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM--Continued

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), the owner of an unpatented mining claim located after Oct. 21, 1976, is required to file evidence of assessment work or notice of intention to hold the claim on or before Dec. 30 of each year following the calendar year in which the claim was located. Failure to so file constitutes abandonment of the claim and renders it void.

A decision declaring a mining claim to be abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be reversed if the mining claimant had filed an affidavit of assessment work for a group of claims that sufficiently identifies that claim.

Use of the term "all contiguous" when appended to a list of mining claims on an affidavit of assessment work, is not sufficient to identify additional claims to comply with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

BLM has no affirmative obligation to send a notice to remind a mining claimant of the need to make annual filings or to contract a mining claimant to ascertain which claims are intended to be included in the annual filings required by 43 U.S.C. § 1744 (1982).

Where BLM has declared some claims void, but not others, apparently on the basis of identical information provided by the claimant in a group affidavit of annual assessment work, and where it is possible the claims would have been identified from information contained in the affidavit, the decision shall be set aside and remanded for further proceedings consistent with the provisions of sec. 314, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Havilah Gold Co., Inc., 112 IBLA 160 (Dec. 11, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

James Boatman, 87 IBLA 31 (May 22, 1985)

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

Arla Newman, 88 IBLA 114 (July 31, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Where a mining claim was located in July 1969 and a copy of the official record of the notice of location was not filed with the proper BLM office on or before Oct. 22, 1979, the claim was properly declared abandoned and void pursuant to 43 U.S.C. § 1744(c) (1982).

John W. Finn, 87 IBLA 55 (May 23, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Max Lair, 87 IBLA 106 (May 30, 1985)

The failure to timely file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office conclusively constitutes abandonment of the mining claim by the owner. This Board has no authority to excuse lack of compliance with the statute or to afford relief from the statutory consequences.

Forrest G. Niccum et al., 87 IBLA 129 (June 6, 1985)

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co.,  
87 IBLA 132 (June 7, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1(b)(1), in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the notice of location was not filed with BLM until after the statutory deadline for filing that document, i.e., 90 days after the date of location, regardless of the fact that it was mailed on the deadline.

Allen B. Clark, 87 IBLA 204 (June 18, 1985)

BLM properly declares a mining claim abandoned and void for failure to timely file a certificate of location as required by 43 CFR 3833.1-2 even though the failure to timely file the certificate was attributed to the county's slow return of the document.

August F. Plachta, 87 IBLA 223 (June 18, 1985)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976, must file in the proper BLM office, within 90 days after the location of such claim, a copy of the official record of the notice or certificate of location. Failure to do so is deemed conclusively to constitute an abandonment of the claim by the owner. 43 U.S.C. § 1744(c) (1982).

Robert W. Van Wyck, 87 IBLA 245 (June 19, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

A mining claim is properly declared void where a copy of the recorded notice of location is not filed pursuant to 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 in the proper BLM office within 90 days after the date of location.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3822.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void for failure to file timely with BLM a copy of the notice of location of the claim, pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Ellis Buschman, 87 IBLA 345 (June 26, 1985)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1-2, the owner of an unpatented mining claim located on Federal land after Oct. 21, 1976, shall file a copy of the official record of the notice of location of the claim with the proper BLM office within 90 days after the date of location of the claim. This requirement is mandatory and failure to comply within the time period prescribed must be deemed conclusively to constitute an abandonment of the mining claim.

Mervil J. Cook, 87 IBLA 348 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void where a copy of the notice of location of the claim was not received by BLM until after the deadline for filing under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), although it was purportedly mailed prior thereto.

David L. Richards, 88 IBLA 1 (July 28, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where a copy of the notice of location was not filed with BLM within 90 days after the date of location of the claim, in accordance with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

H. B. Layne, Contractor, Inc., 88 IBLA 42 (July 10, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Under 43 CFR 3833.1-2(a) the owner of an unpatented mining claim located after Oct. 21, 1976, must file with BLM within 90 days after the date of location of the claim a copy of the official record of the notice or certificate of location of that claim that was or will be filed under state law. Where a single certificate of location for more than one claim is void under Colorado law as to all claims except the first, if properly described, the first claim of 13 claims included in a single certificate of location should be accepted by BLM for recordation under 43 CFR 3833.1-2(a).

Waldron Enterprises Mining, 88 IBLA 54 (July 16, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) within the prescribed time constitutes abandonment of the mining claim.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Frank A. Putnam III, 88 IBLA 314 (Sept. 18, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157 (Aug. 12, 1985)

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

With respect to disputes between rival mining claimants concerning which claimant has the superior right to possession of a claim, a court of competent jurisdiction is the proper forum.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on two or more occasions and given two or more mining recordation serial numbers, the proper corrective procedure is to merge the respective files and cancel one or more of the mining claim recordation serial numbers. If, on a combined basis, all requisite filings have been made, the claim should not be conclusively deemed to be abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

Ralph C. Memmott, 88 IBLA 377 (Sept. 27, 1985)

When circumstances indicate that additional location notices filed by a locator relate to previously filed claims and are in the nature of amendments to those previously filed claims, proofs of labor filed with reference to those amended location notices may be credited to the original locations.

Fred Chaffin et ux., 89 IBLA 137 (Oct. 1, 1985)

BLM may properly declare an unpatented mining claim abandoned and void if a copy of the notice of location for the claim was not received by BLM until after the close of the filing period specified under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though the document was purportedly mailed prior to the deadline.

Anthony J. Perchetti, 89 IBLA 320 (Nov. 13, 1985)

A mining claim notice of location allegedly made in 1912 for land patented to Arizona in 1940 may not be filed with the Department under provisions of the Federal Land Policy and Management Act of 1976, and the Department may not adjudicate such a claim, since the patented land is no longer federal land subject to the recordation provisions of the Act.

Lynn M. Sheppard, 90 IBLA 23 (Dec. 4, 1985) <sup>92</sup> I.D. 613

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

The text of FLPMA itself provides a mining claimant with effective notice of the annual filing requirements. Individualized notices of filing deadlines are not required by the Constitution.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. May, 91 IBLA 141 (Mar. 24, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State, BLM could no longer adjudicate the validity of a claim located on such lands.

Jennie A. Wasey, Harold E. McNally, 92 IBLA 228 (June 24, 1986)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on more than one occasion and more than one mining recordation serial number has been assigned to the claim, the proper corrective procedure is to merge the respective files. If, on a combined basis, all requisite filings have been made, the claim should not be declared abandoned and void for failure to comply with 43 U.S.C. § 1744(b) (1982).

Michael R. Flynn, 92 IBLA 327 (June 17, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

A mining claim recordation document sent to the proper office of BLM in an envelope provided by BLM, affixed with the proper postage by weight, and postmarked on or prior to Dec. 30, but returned for additional postage because of the oversize nature of the envelope, will be considered to have been filed in a timely manner pursuant to 43 CFR 3833.0-5(m); when additional postage is affixed, and the letter is received by BLM before Jan. 19 of the following year.

Oro Fino Dredging Co., 94 IBLA 11 (Sept. 18, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4(b).

Joe Ostrenger, Jack Stacy, 94 IBLA 229 (Nov. 10, 1986)

The Bureau of Land Management may not reject the filing of a notice of location that was filed before the lands upon which the mining claim was located were the subject of an interim conveyance.

Eskil Anderson, 95 IBLA 253 (Jan. 23, 1987)

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

A mining claimant is not required to submit to BLM information sufficiently precise for his claim to be projected onto a township plat. Neither the statute nor the regulations requires a precise map or description of the position of a claim. The test established by statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified on the ground by following the information provided. This is a factual question and unless the description or map is on its face so deficient as to be inadequate as a matter of law, the issue of its sufficiency can be determined only by testing the information in the field.

Because a recorded description and the map filed with BLM are not required to be precise, the uses which

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

may be made of information submitted necessarily depend upon its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks or the legal boundaries of the public land survey, and may permit BLM to determine that the land on which the claim is located has been withdrawn. But a map is useful only to the extent it accurately represents the territory and claim mapped.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

An unpatented mining claim must be deemed abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), where there is no evidence that an instrument of recordation and an initial affidavit of assessment work or notice of intention to hold the claim was filed within the 3-year period following Oct. 21, 1976, by the purported owner of the claim, a predecessor in interest, or an agent.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

Where the 90th day following the date of location of a mining claim falls on a Sunday, a day that the proper BLM office for recording such claim is officially closed, recordation is timely if a copy of the official record of the notice or certificate of location is hand delivered on Monday, the 91st day after location.

Birco Development, 97 IBLA 259 (May 13, 1987)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

BLM may properly declare an unpatented mining claim abandoned and void and reject the recordation of affidavits of assessment work where the owner of the claim failed to file a copy of the notice of location for the claim timely with BLM, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

C. Bert Sanger Trust, 97 IBLA 356 (May 26, 1987)

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the dates of location of the claims, failing which the claims are properly declared abandoned and void.

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

The Department does not have an affirmative duty to immediately adjudicate mineral recordation filings.

Joseph L. Frankmore, 101 IBLA 202 (Feb. 22, 1988)

Where it appears that a specifically identified mining claim has been recorded twice with BLM by the same locators, the second time as a relocation, a finding that the claim as relocated is abandoned and void for failure to file evidence of assessment work, on the ground the proof of labor filed with BLM referred only to the serial number assigned to the earlier recordation, will be reversed in the absence of evidence the relocation was adverse to the earlier location rather than an amended location which relates back.

Edward E. Ellis, 101 IBLA 272 (Mar. 10, 1988)

In the case of mining claims located prior to Oct. 21, 1976, failure to file copies of proofs of labor or notices of intent to hold the claims in the proper BLM office on or before Oct. 22, 1979, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), and 43 CFR 3833.2-1(a) (1979), renders the claims abandoned and void.

Henry E. Krizman et al., 104 IBLA 9 (Aug. 15, 1988)

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filing must be made within each calendar year, i.e., on or after Jan. 1, and on or before Dec. 30. Failure to file within the calendar year results in the claim being extinguished and therefore abandoned and void. In order to constitute a notice of intent to hold, a document filed with BLM must satisfy the requirements of 43 CFR 3833.2-3.

Donald L. Howard, Lorena L. Howard, & Ronald C. Howard, 104 IBLA 374 (Sept. 27, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. A copy of a proof of labor with the BLM serial number marked in handwriting, coupled with a statement that the original and the copy were hand delivered to BLM and a written acknowledgement by a BLM employee that the handwriting is her own, are sufficient evidence to establish that the proof of labor was timely filed at the proper BLM office.

Milton E. Kutil, 104 IBLA 396 (Oct. 5, 1988)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void.

Gordon B. Copple, Estate of Janet Copple, Estate of Gust E. Svensson, Jr., 105 IBLA 90 (Oct. 20, 1988)  
 95 I.D. 219

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), apply to claims which, rely on the provisions of 30 U.S.C. § 38 (1982), to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

The provisions of 30 U.S.C. § 38 (1982), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to lode locations.

Hiram Webb et al., 105 IBLA 290 (Nov. 8, 1988)  
 95 I.D. 242

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

Because a recorded description and the map of a mining claim filed with BLM along with a copy of the notice of location for the claim are not required to be precise, the uses which may be made of the information submitted necessarily depend on its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks, other claims, or corners of the public land survey, and may permit



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RECORDATION OF MINING CLAIMS AND ABANDONMENT--Continued

to determine that the land on which the claim is located has been patented or withdrawn.

John Wright, 112 IBLA 233 (Dec. 20, 1989)

REPEALERS

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS

BLM may properly reject an application for conveyance of a Federally owned mineral interest (oil and gas) to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), where the applicant has not shown that use of the land for production of avocados is a more beneficial use of the land than mineral development.

Richard Alves, Philip G. Smith, Ruth M. Smith, 85 IBLA 397 (Mar. 29, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS--Continued

An application for conveyance of mineral interest to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

Temblor Enterprises, Inc., 86 IBLA 175 (Apr. 26, 1985)

An application for conveyance of mineral interests to the owner of the surface estate pursuant to 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

Because the definition of "known mineral values" at 43 CFR 2730.0-5(b) includes prospective value, absence of current mineral production provides no basis for concluding that land has no known mineral values in adjudicating an application for conveyance of federally owned mineral interests pursuant to 43 U.S.C. § 1719(b) (1982).

An application for conveyance of a federally owned mineral interest is properly rejected if the applicant fails to provide, pursuant to 43 CFR 2720.1-2(d)(4), as complete a statement as possible concerning (i) the nature of federally reserved or owned mineral values in the land, including explanatory information, (ii) the existing and proposed uses of the land, (iii) why the reservation of the mineral interests in the United States is interfering with or precluding appropriate non-mineral development of the land covered by the application, (iv) how and why such development would be a more beneficial use of the land than its mineral development, and (v) a showing that the proposed use



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RESERVATION AND CONVEYANCE OF MINERAL INTERESTS--Continued

complies or will comply with State and local zoning and/or planning requirements.

Kenneth C. Pixley, 88 IBLA 300 (Sept. 13, 1985)

An application for conveyance of mineral interests to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) there are no known mineral values in the land, or (2) the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

Jean Hubbard Waters, 89 IBLA 179 (Oct. 16, 1985)

An application for conveyance of mineral interest to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), may be approved where BLM determines (1) there are no known mineral values in the land, or (2) the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

Where, in adjudicating an application filed pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), seeking conveyance of the retained oil and gas interest, BLM makes a determination that the land has known mineral value in that it is prospectively valuable for oil and gas, such determination being based on the fact that the land is in an area of oil and gas drilling activity and is subject to an outstanding Federal oil and gas lease, that determination

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued  
RESERVATION AND CONVEYANCE OF MINERAL INTERESTS--Continued

will not be overcome by a mere allegation that there are no known mineral values in the land.

Richard L. Dickard, Sr., et al., 90 IBLA 83 (Dec. 20, 1985)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

An application for conveyance of Federally owned mineral interests to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), is properly rejected where the mineral interests are the subject of a valid minerals site right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

A decision rejecting an application for conveyance of Federally owned mineral interests under sec. 209(b) of FLPMA because of a finding that the lands applied for have "known mineral values" must be supported by facts of record. If the finding is based solely on an uncorroborated, conclusory memorandum, the decision will be set aside and the matter remanded for readjudication.

When an application for conveyance of a Federally owned mineral interest fails initially to adequately specify why the reservation of mineral interests is interfering with or precluding appropriate nonmineral development of the lands applied for, or how and why such nonmineral development would be a more beneficial use of these lands than mineral development,

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RESERVATION AND CONVEYANCE OF MINERAL INTERESTS--Continued

such failure does not subject the application to automatic rejection. Rather, if BLM determines that the lands applied for possess "known mineral values," BLM should then provide the applicant with an opportunity to make a showing of interference with existing uses, as contemplated by 43 CFR 2720.1-1(a)(2) and 2720.2(d)(4).

Wayne D. Klump et al., 104 IBLA 164 (Sept. 6, 1988)

Where, upon the filing of an application for conveyance of a Federally owned mineral interest, the record shows that the mineral interest previously had been conveyed by the United States to another party, BLM properly rejects the application. However, where the record also shows that the applicant, rather than the patentee, was an existing record owner of the surface estate within the meaning of sec. 209(b)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b)(2) (1982), at the time the United States conveyed the mineral interest, BLM should determine whether the patent may be corrected in accordance with sec. 316 of FLPMA, 43 U.S.C. § 1746 (1982), and failing that, recommend a suit to cancel the patent.

Michael L. Jensen, Jerilee A. Jensen, 105 IBLA 375 (Nov. 29, 1988)

Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining claims located on such lands are properly declared null and void ab initio.

Golden Reward Mining Co., 111 IBLA 217 (Oct. 16, 1989)  
96 I.D. 452

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985)  
92 I.D. 58

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc., Springfield Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where the record indicates BLM did not consider whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

An appraisal by BLM of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in BLM's appraisal method or fails to show by convincing evidence that charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Glover Communications, Inc., 89 IBLA 276 (Nov. 8, 1985)

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jancur, Inc., 93 IBLA 310 (Sept. 11, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, Jr., 94 IBLA 138 (Oct. 21, 1986)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 94 IBLA 167 (Oct. 28, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

Use of public lands for the purpose of conducting military maneuvers is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982).

Dept. of the Army, 95 IBLA 52 (Dec. 19, 1986)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over, upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982):

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of-way only if the public interest outweighs the objections of the village.

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines, provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)



## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

## RIGHTS-OF-WAY--Continued

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

John March, 98 IBLA 143 (June 22, 1987)

Where a right-of-way applicant was charged \$375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of \$25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the \$375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n., Inc., 98 IBLA 275 (July 17, 1987)

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

## RIGHTS-OF-WAY--Continued

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

Where BLM issues a right-of-way grant which includes a provision stating that the grant is renewable under certain conditions, the grant does not automatically terminate on its expiration date but is subject to renewal in accordance with the stated terms and conditions, and 43 CFR 2803.6-5(a).

Coors Energy Co., 99 IBLA 37 (Sept. 8, 1987)

Under the regulations governing right-of-way applications, the authorized officer may require the applicant to submit additional information as he deems necessary. Also, the authorized officer is required to issue a deficiency notice when he finds the information supplied is incomplete or not in conformance with the law. However, the authorized officer is not required to request further information prior to issuance of a deficiency notice.

A right-of-way application for a wind farm is a request for a non-linear right-of-way, and, therefore, processing fee requirements are governed by 43 CFR 2803.1-1(a)(3)(ii). Where BLM requests submission of additional fees to cover processing costs for such a non-linear right-of-way, and the applicant fails to pay such fees, a BLM decision rejecting the application for failure to make additional payment will be upheld on appeal.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

An appraisal of a reservoir right-of-way granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

A decision to reject a right-of-way application for a wind-turbine generating facility will be affirmed where the record supports a finding that the right-of-way would be inconsistent with the purpose for which the tract of public land at issue is being managed.

Kenneth W. Bosley, 101 IBLA 52 (Jan. 26, 1988)

When various right-of-way grantees who utilize helicopters to access a communication site object to the grant of a subsequent right-of-way to another applicant on the ground that the right-of-way will interfere with helicopter access, and the record establishes that there has been no authorization to use a helicopter to access the site, the casefiles will be remanded to BLM so that it may take affirmative action to either prohibit or formally permit such use.

KLAS, Inc., et al., 101 IBLA 206 (Feb. 23, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal where an appellant fails to show the rental rate set by BLM is excessive.

Harvey Singleton, 101 IBLA 248 (Feb. 29, 1988)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show the rental rate is excessive. Absent a showing that appraisal methods used to set the rental rate are incorrect, a BLM appraisal may, in general, only be rebutted by another appraisal.

Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (Feb. 29, 1988)

One who has not participated in the decision-making process prior to a BLM decision concerning action affecting closure of a public right-of-way is not a "party to a case" within the meaning of 43 CFR 4.410(a). Such a person lacks standing to appeal, even though he may be adversely affected by a decision. To have standing to appeal, one must be both a party to a case and adversely affected by a decision.

Edwin H. Marston, 103 IBLA 40 (June 23, 1988)

Where BLM has approved the assignment of a wind park right-of-way subject to execution of new authorized user agreements with existing authorized users who have the right to use sites within the right-of-way for construction of wind turbine generators, such users have standing to appeal from a subsequent BLM decision issued to the right-of-way holder ordering removal of all generators on the right-of-way.

A decision by BLM ordering the holder of a wind park right-of-way to remove or have removed from the right-of-way all wind turbine generators on the basis that none of the retrofit report proposals submitted met the criteria of positive feasibility for long-term

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

productivity will be vacated where the evidence relied upon by BLM does not support the action taken.

Storm Master Owners et al., 103 IBLA 162 (July 21, 1988)

A decision of BLM to issue a right-of-way for a waste water injection well on public land where the mineral estate is held by private parties will be affirmed in accordance with the general rule in American law that once minerals have been removed from the ground the void formerly occupied by the minerals reverts to the surface owner in the absence of any controlling precedent to the contrary.

An appraisal of the fair market value of a right-of-way will not be set aside on appeal if appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that charges are excessive. In the absence of a showing that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

An application for a reduction in the fair market rental value charged for a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), on the ground of hardship, pursuant to the regulation at 43 CFR 2803.1-2(b)(2)(iv), 52 FR 25819 (July 8, 1987), may be adjudicated for an existing right-of-way where the holder has tendered the estimated advance rental deposit demanded by BLM.

BLM's decision to require the posting of a bond by the holder of a right-of-way will be upheld when appellant fails to demonstrate that BLM's decision is in error.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Generally, the Board of Land Appeals will uphold a BLM appraisal of a right-of-way unless it can be shown that BLM has failed to apply the proper criteria when calculating the fair market value right-of-way rental or the resulting charges are shown to be excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Generally, the proper appraisal analysis method for determining the fair market rental value of non-linear rights-of-way is a site-specific analysis of comparable sites with adjustment for variances in the site conditions.

BLM may reduce rental payments for communication site rights-of-way if it determines that the imposition of the fair market value rental would cause an undue hardship on the right-of-way holder or applicant.

High Country Communications, Inc., 105 IBLA 14 (Oct. 11, 1988)

A BLM decision to transfer the administration of a right-of-way to a patentee of Federal land will be affirmed as a proper exercise of discretion where it is shown that the public interest is best served by the transfer of administration.

City of Las Cruces, 105 IBLA 50 (Oct. 17, 1988)

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Communications Enterprises, Inc., 105 IBLA 132 (Oct. 26, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Under 43 CFR 2803.1-2(b), a reduction or waiver of the rental rate for a right-of-way may be granted when the holder of the right-of-way provides without charge, or at a reduced rate, a valuable service to the public.

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

BLM does not have the authority under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

Phillips Petroleum Co., 105 IBLA 345 (Nov. 17, 1988)

Nothing in the general mining laws invests individuals who reside on patented mineral land with a right of access across Federal land, when it appears from the record that the land is not subject to mineral exploration and development.

When individuals who gain access to private property by means of a timber road across Federal lands fail to maintain the road so as to prevent damage to the road and the surrounding environment, BLM properly terminates their use of the road under the "casual use" regulations, 43 CFR 2800.0-5(m). Where private landowners' use of a BLM road does not qualify as casual use under the regulations, they must obtain a right-of-way grant pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), in order to continue to use the road.

Bob Strickler et al., 106 IBLA 1 (Nov. 30, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

Approval of an application for a communication site right-of-way pursuant to sec. 501(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(5) (1982), is discretionary with the Department. A decision rejecting a single-user right-of-way application will be affirmed on appeal where it is predicated on the public interest in limiting authorized sites to multi-user facilities and the evidence fails to establish a multi-user site would not adequately serve the applicant's needs.

Glenwood Mobile Radio Co., 106 IBLA 39 (Dec. 7, 1988)

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Where there are multiple users of the same communication site, each user is individually responsible



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

for the fair market rental value of the authorized use of the site.

Chalfont Communications, 108 IBLA 195 (Apr. 13, 1989)

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

An appraisal of fair market rental value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal.

Big Sky Communications, Inc., 110 IBLA 213 (Aug. 21, 1989)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedRIGHTS-OF-WAY--Continued

Where a BLM determination of the fair market rental value of a communications site right-of-way is based on a market study appraisal which does not comport with a proper application of the comparable lease method of appraisal and fails to provide data and analysis sufficient to determine the comparability of the right-of-way and private leases for similar communications use, the Board will vacate the value determination and remand the case for reappraisal.

Joyce Communications, Inc., 111 IBLA 255 (Oct. 25, 1989)

A decision to terminate a right-of-way granted pursuant to Title V of the Federal Land Policy and Management Act of 1976 will be set aside where, contrary to the provisions of 43 U.S.C. § 1766 (1982), as implemented by 43 CFR 2803.4(d), a reasonable opportunity to cure noncompliance with the terms of the right-of-way grant was not allowed the right-of-way holder.

Gene Quickley, Jr., 112 IBLA 144 (Dec. 4, 1989)

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Great Co., 112 IBLA 239 (Dec. 21, 1989)

RULES AND REGULATIONS

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RULES AND REGULATIONS--Continued

information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

Issuance of a recreational permit allowing motor vehicle travel in Arch Canyon without first amending an existing Management Framework Plan which prohibited such usage was contrary to provisions of 43 CFR 1610.8. Unless the Management Framework Plan were first amended to allow such travel, the prohibited usage could not be permitted.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

SALES

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SALES--Continued

Under 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which gives an adjacent landowner a preference right to purchase land by meeting the highest bid. A bidder who fails to object to such a procedure during the time provided by a notice of sale cannot seek to have the procedure changed after the sale has taken place.

Luther D. Moss, 89 IBLA 171 (Oct. 11, 1985)

Where the designated bidder in a proposed sale pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), shows significant discrepancies between the method of appraisal and the appraisal standards adopted by the Department regarding consideration of highest and best use and seller financing in analyzing comparable transactions, the case may be remanded to BLM for a reevaluation of the fair market value of the land.

Byron R. Meyer, 89 IBLA 219 (Oct. 28, 1985)

An applicant for conveyance of Federally owned mineral interests under sec. 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), must show the surface of the land applied for is owned by the applicant. Where the applicant does not deposit the requested administrative costs as required by 43 CFR 2720.1-3(b)(1), the application is properly rejected.

Niles H. Thim Corp., 93 IBLA 128 (July 29, 1986)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedSALES--Continued

date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

Under sec. 203(f) of FLPMA, 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which adequately accommodates the preference rights of the adjacent landowners where they all have an equal opportunity to submit sealed bids for a small parcel that does not lend itself to a division among the adjoining landowners and the record does not support a direct sale to any one of the preference bidders.

Where the regulations in 43 CFR 2711.1-2(a) governing a notice of realty action for public sale require that a notice identifying a tract for sale be sent to parties in interest by BLM 60 days prior to the sale, and provide for a 45-day comment period, a notice not timely sent to an interested party will not negate the sale where the party asserting the deficiency had actual notice of the sale, had an opportunity to comment and participate in the sale, and was not prejudiced by BLM's failure to provide a timely notice.

Richard D. & Virginia Troon, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

Competitive bidding procedures are mandated for public sales under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), unless equitable considerations or public policies indicate modified competitive bidding or noncompetitive bidding procedures may be employed. Where the lands to be sold are within a developing or urbanizing area, competitive bidding procedures may be appropriate even though an adjoining landowner protests on the grounds

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedSALES--Continued

the potential uses of the lands may adversely affect him.

Dean M. Anderson, 94 IBLA 88 (Sept. 30, 1986)

Under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), and applicable regulations, BLM may resolve an unauthorized use of public land by private, noncompetitive sale of the parcel. It is within the discretion of the authorized officer to exclude from sale lands considered to have wetland and riparian values and to retain such lands in public ownership.

C. Sody Soderstrom, 95 IBLA 382 (Feb. 20, 1987)

When BLM determines to sell a tract of public land because the land is difficult and uneconomic to manage, one of the standards for disposal set forth in sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), and that determination is protested by a group holding grazing permits for such land, the decision denying the protest will be set aside where the group alleges the land is not difficult and uneconomic to manage and there is a lack of substantial evidence in the record to support BLM's determination.

Washboard Permittee Group, 99 IBLA 10 (Aug. 12, 1987)

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather, it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

BLM may properly decide to make a direct sale of an isolated parcel of public land to an existing grazing user, who is also one of the adjoining landowners, rather than engage in regular or modified competitive bidding, under sec. 203(f) of the Federal



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SALES--Continued

Land Policy and Management Act of 1976, 43 U.S.C. § 1713(f) (1982).

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

Under 43 CFR 4.410, standing to appeal is limited to a party to the case adversely affected by the decision appealed from. A party who expresses no intention to purchase an isolated tract of Federal land by submitting a competitive bid on the tract lacks standing to appeal the manner in which the sale is conducted.

Kenneth W. Bosley, 101 IBLA 52 (Jan. 26, 1988)

A notice of realty action issued by the Bureau of Land Management to notify the public of a proposed direct sale of public land and to solicit comments on the proposal is not a decision subject to appeal under 43 CFR 4.410, since it is merely an announcement of action proposed to be taken.

Although a person who files a protest to a proposed direct sale of public land becomes a party to a case within the meaning of 43 CFR 4.410 when the protest is denied and a timely appeal is filed, in order to maintain an appeal, the person must show an interest which has been adversely affected by the decision.

Kenneth W. Bosley, 102 IBLA 235 (May 19, 1988)

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

SALES--Continued

Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

Exxon Corp., 106 IBLA 207 (Dec. 21, 1988)

It was proper for BLM to cancel a sale of public land following acceptance of high bids when the sale was found to be contrary to an injunction entered in Nat'l Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). In such case a refund of deposits submitted with the high bids was proper. However, in the absence of express statutory authority, no interest on the funds deposited may be paid by BLM.

Gordon L. Hardy, 106 IBLA 227 (Dec. 27, 1988)

BLM's failure to send a notice to the co-owner of an adjoining parcel of land as required by 43 CFR 2711.1-2(a) will not vitiate a public sale of the parcel by modified competitive bidding procedure where the co-owner had actual knowledge of the sale prior to the sale date and subsequently participated in the sale.

The failure of a high bidder to include proof of United States citizenship with a sealed bid is a curable defect not requiring rejection of a bid submitted pursuant to modified competitive bidding procedures.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedSALES--Continued

the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining claims located on such lands are properly declared null and void ab initio.

Golden Reward Mining Co., 111 IBLA 217 (Oct. 16, 1989)  
96 I.D. 452

SERVICE CHARGES

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

SURFACE MANAGEMENT

Under the regulations adopted by the Bureau of Land Management, the authorized officer has no authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

Pursuant to 43 CFR 3809.3-2(d), a notice of non-compliance properly issues upon a determination that a

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedSURFACE MANAGEMENT--Continued

use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985)  
92 I.D. 208

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987)  
94 I.D. 56

WILDERNESS

Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the unit's naturalness, qualities and whether an inventory unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1982), will be set aside and the case remanded to BLM where, on appeal, the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite naturalness or outstanding opportunities for solitude or a primitive and unconfined type of recreation, and the record does not adequately support BLM's conclusions on these matters.

Committee for Idaho's High Desert, 85 IBLA 54 (Feb. 11, 1985)

Evaluations made by BLM personnel in the wilderness inventory process are necessarily subjective and judgmental. The conclusions reached must be accorded considerable deference notwithstanding the result might be one over which reasonable men could differ. An appellant seeking reversal must ordinarily show either a clear error of law or a demonstrable error of fact.

Committee for Idaho's High Desert, The Wilderness Society, 85 IBLA 112 (Feb. 14, 1985)

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreements.

A BLM decision based on reassessment of the wilderness characteristics of a unit will be reversed where it is established that BLM failed properly to reassess the unit, and it is also established that such failure caused BLM to reach an incorrect conclusion.

Utah Wilderness Ass'n et al., Clive Kincaid, 86 IBLA 89 (Apr. 12, 1985)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

A BLM decision regarding competing uses of public land that is based on a consideration of all relevant factors and is supported by the record will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. Relevant factors for consideration in a BLM decision opening an area of the Panamint Dunes within a wilderness study area in the California Desert Conservation Area to off-road vehicle use are whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the opening because of the potential for unnecessary degradation of cultural resources, the decision will be reversed.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Amoco Production Co. et al., 92 IBLA 333 (June 30, 1986)

When an oil and gas lease of lands located within a wilderness study area is issued after enactment of the Federal Land Policy and Management Act of 1976, subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability, and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, the denial is not a restriction tantamount to a suspension under 30 U.S.C. § 209 (1982).

Beartooth Oil & Gas Co., 94 IBLA 115 (Oct. 9, 1986)

Where an oil and gas lease, issued after the enactment of the Federal Land Policy and Management Act of 1976, embraces lands within a wilderness study area and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, a subsequent request for suspension of operations and production will be adjudicated on the basis of whether or not at the time of issuance BLM encumbered the lease with a wilderness protection or no-surface-occupancy stipulation. The suspension policy, as set forth in the "Interim Management Policy and Guidelines for Lands under Wilderness Review," is to grant a suspension for such a lease issued without either of those stipulations.

Amoco Production Co., et al. (On Reconsideration), 96 IBLA 260 (Mar. 26, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

No violation of the nonimpairment policy set forth in sec. 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), is established by BLM's grant of a right-of-way across public lands adjacent to a wilderness study area where the right-of-way will permit the developer of a hydro-electric concern to convey water diverted from a river entering the wilderness study area.

California Wilderness Coalition et al., 98 IBLA 314 (July 30, 1987)

A BLM decision to designate certain roads within the King Range National Conservation Area as open to unrestricted or limited vehicle use by the general public will not be disturbed on appeal absent a showing of compelling reasons for modification or reversal. However, where a portion of the King Range has been designated a wilderness study area, relevant factors for consideration of whether to open the area to off-road vehicle use must include whether such activity will impair the area's suitability for wilderness preservation or whether unnecessary or undue degradation of the lands and their resources will take place. Where the record does not support the road opening because it reveals the threat of unnecessary degradation of the natural and cultural resources, the decision will be reversed.

California Wilderness Coalition et al., 101 IBLA 18 (Jan. 25, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. However, if mining operations on such lands may continue, if the operations are occurring in the same manner and degree as on Oct. 21, 1976. A mining plan of operations for claims located after Oct. 21, 1976, even though those claims embrace the same lands covered by different claims located prior to Oct. 21, 1976, cannot be considered to be a continuation of any operations undertaken pursuant to the previous claims and cannot qualify for the less restrictive management standard.

Approval of a mining plan of operations for post-FLPMA mining claims within a wilderness study area may properly be denied when planned road building and blasting impacts could not be rendered substantially unnoticeable before a final wilderness designation decision is made.

Eugene Mueller, 103 IBLA 308 (Aug. 4, 1988)

A mining claim located in a wilderness study area after Oct. 21, 1976, is subject to provision of 43 U.S.C. § 1782(c) (1982), requiring that the land be managed to prevent impairment of the area for wilderness preservation. Where a mining claim located prior to Oct. 21, 1976, becomes abandoned and void for failure to comply with the recordation provisions of 43 U.S.C. § 1744 (1982), a mining claim located in 1979 covering the same area as the void claim is subject to the nonimpairment standard imposed upon claims located in wilderness study areas after Oct. 21, 1976, by 43 U.S.C. § 1782(c) (1982).

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area when the record supports the conclusion that the road would impair the suitability of the area for preservation as wilderness, contrary to provision of 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

WILDERNESS--Continued

In a petition for reconsideration of a Board decision closing roads within the King Range Wilderness Study Area to off-road vehicle use, BLM offered new evidence to show that it increased its law enforcement capability in the area and has purchased property in order to better control illegal off-road vehicle use. In consideration of the new evidence tending to show that BLM will be better able to control off-road traffic as a result, the Board's prior decision will be vacated in part where the evidence shows that these measures will protect against the impact of off-road vehicle use on the natural and cultural resources of the wilderness study area.

California Wilderness Coalition et al. (On Reconsideration), 105 IBLA 196 (Nov. 2, 1988)

The Interim Management Policy and Guidelines for Lands Under Wilderness Review are binding on all BLM State offices. No decision in conflict with the Interim Management Policy and Guidelines for Lands Under Wilderness Review may be sustained on appeal in the absence of an express justification in the record for the failure to follow the policy guidelines established by the Interim Management Policy and Guidelines for Lands Under Wilderness Review.

The Wilderness Society, 106 IBLA 46 (Dec. 8, 1988)

A notice of noncompliance issued to an operator conducting operations under an approved plan of operations for failure to comply with 43 CFR 3802.4-6, will be vacated even though the operator's attitude at different times appeared to BLM to be hostile, abusive, and confrontational where the record shows that the authorized officer was able to make regular compliance investigations of the site, and held telephone conversations with the operator about his mining activities.

An operator conducting operations under an approved plan of operations is required under 43 CFR 3802.4-7 to notify the authorized officer of any suspension of operations within 30 days after such suspension. Where evidence offered on appeal shows



FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedWILDERNESS--Continued

that operations are continuing, the lack of activity observed between a 30-day period by itself is insufficient to subject the operator to the notice requirement of the regulation, and a notice of non-compliance issued for failure to give such notice will not be sustained on appeal.

Mining operations within wilderness study areas must be conducted under properly filed and approved plans of operations. Where a claimant appeals a notice of noncompliance, and on review the record establishes that operations being conducted exceed those authorized by BLM, and described in the plan of operations, the case will be remanded for the filing of a proper plan of operations and the posting of bond to ensure reclamation of the site after operations are completed.

Robert E. Oriskovich, 106 IBLA 93 (Dec. 13, 1988)

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may involve any unnecessary or undue degradation to WSAs which would require preparation of an environmental impact statement.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

BLM properly denied approval of two free-use applications for sand and gravel aggregate excavation within a wilderness study area where impacts of the excavation could not be rendered substantially unnoticeable before a final wilderness designation was

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--ContinuedWILDERNESS--Continued

scheduled to be made pursuant to 43 U.S.C. § 1782 (1982).

California Dept. of Transportation, 111 IBLA 251 (Oct. 25, 1989)

WITHDRAWALS

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982GENERALLY

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986)  
93 I.D. 6



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

GENERALLY--Continued

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required \* \* \* by applicable law" under 43 U.S.C. § 1734(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986) 93 I.D. 285

"Registered mail." As used in sec. 109(h) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719(h) (1982), the term "registered mail" embraces either "registered mail, return receipt requested" or "certified mail, return receipt requested."

Texaco, Inc., 102 IBLA 86 (Apr. 14, 1988)

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982).

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ASSESSMENTS

When regulations governing assessments for erroneous reporting of sales and royalty remittance information have been amended to allow lower assessments, the Board may apply those regulations, absent intervening rights or countervailing public policy reasons, where to do so will benefit the appellant.

Forest Oil Corp., 107 IBLA 1 (Jan. 23, 1989)

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

CIVIL PENALTIES

The procedural protection afforded by sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982 (43 U.S.C. § 1719 (1982)), does not apply to assessments levied under the oil and gas lease operating regulations.

M. John Kennedy, 102 IBLA 396 (June 21, 1988)

Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly and willfully failing to timely make a royalty payment as specified in an

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

CIVIL PENALTIES--Continued

administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

Assessment of a civil penalty for knowingly and willfully failing to comply with a final royalty payment order pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 pending judicial review of the propriety of that order will be affirmed as not violating constitutional due process restrictions by impairing the right to judicial review where the lessee assessed has failed to avail itself of the opportunity to obtain a stay of the royalty payment order conditioned upon the tender of acceptable security for the obligation at issue.

The exercise of the Secretary's discretion to set the amount of a civil penalty assessed pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 after a hearing properly requires the exercise of reasoned discretion on a case-by-case basis. Factors properly considered in deciding the amount of the penalty include the good or bad faith of appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter such conduct and to uphold the authority of the Minerals Management Service.

Marathon Oil Co. v. Minerals Management Service,  
106 IBLA 104 (Dec. 14, 1988) 95 I.D. 265

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

Where the language of a negotiated coal lease provides that the value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs incurred between the point of delivery from the pit and the point of sale, and it is clear from the record that all transportation costs from the pit to the processing plant were intended to be deductible, the point of delivery from the pit is properly held to be the point when the haul trucks have been loaded in the pit.

Royalties, production and severance taxes, black lung taxes, and reclamation fees are properly considered to be elements of the costs of mining and, as such, no part of these expenses will be allowed to be

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

deducted from value for royalty computation purposes as an indirect cost of transportation or processing.

Black Butte Coal Co., 103 IBLA 145 (July 21, 1988)  
 95 I.D. 89

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

There is a legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents properly filed with them. This presumption is not rebutted where appellant asserts that royalty checks were timely mailed, but the checks were not cashed and there is no evidence the checks were received by Minerals Management Service.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease,

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

When only a part of a producing oil and gas lease is committed to a unit agreement, the uncommitted portion is segregated into a new lease and given a new lease number. An assessment of late payment charges will be reversed where the royalty was timely paid but initially credited to the account of the parent lease rather than a segregated lease created by partial commitment of the parent lease to a unit agreement and the misidentification was the result of delay in notifying the payor of the segregation and the new lease number for the segregated lands.

Phillips Petroleum Co., 108 IBLA 340 (May 9, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was redelivered to the lessee at the end of the pipeline, and the only consideration paid was a \$2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)



FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation, valuing production by another acceptable method, and demanding payment of royalty based on this method.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

The computation of an allowance for transportation and processing costs under the terms of a coal lease permitting the deduction of those costs from the value of the coal may be upheld as reasonable where it is based on the sum of the annual operating and maintenance expenses, the annual depreciation of transportation and processing equipment, and a return on undepreciated investment based on the prime interest rate.

Black Butte Coal Co., 111 IBLA 275 (Oct. 26, 1989)

The assessment of additional royalty due as a result of the improper deduction of a transportation allowance discovered during an audit may be affirmed where the improper deduction commenced prior to the period of the audit in the absence of evidence of a prior audit or adjudication of royalty due under the lease which dealt with the issue.

Forest Oil Corp., 111 IBLA 284 (Oct. 26, 1989)

An assessment of interest charges for late payment of royalty pursuant to the regulation at 30 CFR 218.54(a) will be upheld on appeal where the error in payment resulted from a defect in the manufacture of the metering equipment used to measure production. The fact that the defect was caused by the negligence of a third party (the manufacturer) and was not readily apparent to the lessee will not absolve the lessee of liability for accurate measurement of production and payment of interest on any royalty thereon not timely paid.

Cotton Petroleum Corp., 112 IBLA 1 (Nov. 8, 1989)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982  
--Continued

ROYALTIES--Continued

In valuing, for royalty computation purposes, natural gas liquid products processed and sold under non-arm's-length contracts in Louisiana, MMS may properly compare the prices reported by the lessee to published spot market prices for similar products in Texas where the lessee fails to establish that its prices are reflective of fair market value received under arms's-length contracts. However, where the reported prices fall below the lowest spot market price constituting the fair market value floor, MMS may not value production according to an average spot market price.

Mobil Oil Corp., 112 IBLA 56 (Nov. 21, 1989)

When the lessee's price for natural gas liquid products is less than the minimum yardstick value established in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, it is improper for MMS to utilize the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Cities Service Oil & Gas Corp., 112 IBLA 89 (Nov. 24, 1989)

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Mobil Oil Corp., 112 IBLA 198 (Dec. 13, 1989)

FEES

(See also Accounts--if included in this Index.)

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to

FEES--Continued

Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

FEES--Continued

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

Where a right-of-way applicant was charged \$375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of \$25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the \$375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n, Inc., 98 IBLA 275 (July 17, 1987)

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails



FEES--Continued

to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

FISH AND WILDLIFE SERVICE

Trespass cabins located within Tuxedni National Wildlife Refuge are not eligible for continued private use, and special use permits for such use may not be issued pursuant to sec. 304 of the Alaska National Lands Conservation Act of 1980. The construction and occupancy of structures in trespass upon wilderness lands confer no rights which may be asserted against the United States.

Edd J. Perry, Richard E. King, Hansel E. Donoho, 6 OHA 113 (Jan. 2, 1986)

GEOTHERMAL LEASES

(See also Hearings, Mineral Leasing Act--if included in this index.)

APPLICATIONSGenerally

Land included within an outstanding geothermal resources lease, whether the lease is void, voidable, or valid, is not available for leasing, and an offer filed for such land must be rejected.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

CANCELLATION

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

COMPETITIVE LEASES

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a

GEOTHERMAL LEASES--ContinuedCOMPETITIVE LEASES--Continued

preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985)

The Secretary of the Interior has the discretionary authority to reject a competitive geothermal lease bid where it fails to reflect fair market value for the parcel. A decision rejecting a bid on such a basis will be affirmed where the record establishes a rational basis for the conclusion and appellant has neither rebutted the basis for the conclusion nor shown that his bid represents fair market value.

Grant S. Lyddon, 98 IBLA 321 (July 30, 1987)

CONSENT OF AGENCY

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing,

GEOTHERMAL LEASES--ContinuedCONSENT OF AGENCY--Continued

i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

DISCRETION TO LEASE

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985)

ENVIRONMENTAL PROTECTIONGenerally

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will

GEOHERMAL LEASES--ContinuedENVIRONMENTAL PROTECTION--ContinuedGenerally--Continued

be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

When BLM has adopted a staged leasing program and notifies a potential geothermal lessee that all post-lease plans for exploration and development are subject to site-specific environmental review, and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

Union Oil Co. of California, 99 IBLA 95 (Sept. 17, 1987)

Union Oil Co. of California et al., 102 IBLA 187 (May 5, 1988)

KNOWN GEOHERMAL RESOURCES AREA

A noncompetitive geothermal resources lease offer must be rejected where the land is found to be within a known geothermal resources area prior to lease issuance and the offeror presents no evidence to show that the known geothermal resource area designation is in error.

Robert T. Forest, 104 IBLA 201 (Sept. 12, 1988)

LANDS SUBJECT TO

Land included within an outstanding geothermal resources lease, whether the lease is void, voidable, or valid, is not available for leasing, and an offer filed for such land must be rejected.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

GEOHERMAL LEASES--ContinuedLANDS SUBJECT TO--Continued

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

LEASES AND PERMITSGenerally

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

NONCOMPETITIVE LEASES

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970/30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)



GEOTHERMAL LEASES--ContinuedNONCOMPETITIVE LEASES--Continued

A noncompetitive geothermal resources lease offer must be rejected where the land is found to be within a known geothermal resources area prior to lease issuance and the offeror presents no evidence to show that the known geothermal resource area designation is in error.

Robert T. Forest, 104 IBLA 201 (Sept. 12, 1988)

REINSTATEMENT

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who makes a tardy rental payment because of a computer malfunction and coincident change of business offices.

Hydra-Co Enterprises, Inc., 102 IBLA 46 (Apr. 13, 1988)

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who stops payment on his rental checks because they were drawn on the wrong account and thereafter submits replacement checks which are received by the Minerals Management Service after the anniversary date of the lease, and reinstatement is properly denied.

James P. Miner, Texploration, Inc., 109 IBLA 220 (June 15, 1989)

RELINQUISHMENTS

A relinquishment of a geothermal lease will not be accepted if it is filed by an individual who cannot establish his authority to act on behalf of the lessee of record.

Ralph L. Phelps, Jr., 97 IBLA 397 (May 27, 1987)

GEOTHERMAL LEASES--ContinuedROYALTIES

In determining the royalty due to the United States pursuant to a geothermal resource lease, it is proper for the Minerals Management Service to include, as part of the value basis for computing royalty, the amounts the purchasers of the steam have paid to the lessee for effluent disposal. Such payments are in the nature of a reimbursement of expenses, are properly viewed as part of the total consideration accruing to the lessee from the sale of the geothermal resources, and are a part of the geothermal production subject to royalty as required by 30 CFR 206.300.

Geysers Geothermal Co., 100 IBLA 282 (Dec. 16, 1987)

TERMINATION

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who makes a tardy rental payment because of a computer malfunction and coincident change of business offices.

Hydra-Co Enterprises, Inc., 102 IBLA 46 (Apr. 13, 1988)

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who stops payment on his rental checks because they were drawn on the wrong account and thereafter submits replacement checks which are received by the Minerals Management Service after the anniversary date of the lease, and reinstatement is properly denied.

James P. Miner, Texploration, Inc., 109 IBLA 220 (June 15, 1989)

GRAZING AND GRAZING LANDS

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(2), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock

# GRAZING AND GRAZING LANDS--Continued

operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses, and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe B. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 200 (June 12, 1986)

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 93 IBLA 109 (July 24, 1986)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the

# GRAZING AND GRAZING LANDS--Continued

provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

Where facts and law are properly set forth and applied in Administrative Law Judge's decision affirming the BLM Area Manager's decision determining that the appellant had grazed livestock in his allotment beyond his authorized use; that the grazing of the livestock constituted a willful trespass; and that the appellant's grazing authorization should be suspended until he paid assessed trespass damages, and appellant has made no showing that the decision is in error, the decision will be affirmed.

Kent Gregersen v. Bureau of Land Management, 101 IBLA 269 (Mar. 8, 1988)

The failure of a licensee of the Federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for 2 consecutive years reduces the qualifications of the base property to the extent that it has not been covered by the requests for 2 consecutive years, even though the qualifications of the base property have not been formally adjudicated.

Estate of Leonard Banegas v. Bureau of Land Management, Elias Salazar, Emma Benegas, & Edward Banegas (Inter-venors), 108 IBLA 162 (Apr. 11, 1989)

GRAZING LEASES

(See also Taylor Grazing Act--if included in this Index.)

CANCELLATION OR REDUCTION

When an assignee of a grazing lease agrees to an additional stipulation providing that the grazing lease may be terminated upon 30 days notice if the BLM acts upon a state selection application, BLM need not submit a state grazing lease as part of its notice of termination.

Charles H. Dorman et al., 93 IBLA 109 (July 24, 1986)

Lands leased under the Act of Mar. 4, 1927, are not subject to settlement, location, and acquisition under the nonmineral land laws applicable to Alaska unless and until the authorized officer determines that the grazing lease should be canceled or reduced.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

When a grazing lessee agrees to an additional stipulation providing that the grazing lease may be terminated upon 30-days notice if the BLM acts upon a state selection application encompassing the leased lands, BLM need not submit a state grazing lease in conjunction with the notice of termination.

Harold Sargent, 100 IBLA 267 (Dec. 15, 1987)

PREFERENCE RIGHT APPLICANTS

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the

GRAZING LEASES--ContinuedPREFERENCE RIGHT APPLICANTS--Continued

expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

Grazing use of land administered by a county government as a result of a grant to that governmental body pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), will not be credited as "historical use" for the purposes of adjudicating the competing qualifications of grazing applications pursuant to 43 CFR 4130.1-2.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

RENEWAL

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act--if included in this Index.)

GENERALLY

A grazing licensee's right to request an adjustment of grazing privileges under a range-line agreement will not be barred by laches if the facts show that there has been no lack of diligence in asserting the claim.

Where grazing licensees have executed a valid range-line agreement approved by this Department, such an agreement has generally been treated by the



## GRAZING PERMITS AND LICENSES--Continued

### GENERALLY--Continued

Department as an enforceable contract. Therefore, those terms specifically set forth in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with BLM's approval.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

When BLM determines to sell a tract of public land because the land is difficult and uneconomic to manage, one of the standards for disposal set forth in sec. 203(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(a) (1982), and that determination is protested by a group holding grazing permits for such land, the decision denying the protest will be set aside where the group alleges the land is not difficult and uneconomic to manage and there is a lack of substantial evidence in the record to support BLM's determination.

Washboard Permittee Group, 99 IBLA 10 (Aug. 12, 1987)

### ADJUDICATION

Where two preference right applicants file conflicting applications for a grazing lease, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1982), mandates issuance of the new lease to the holder of the expiring lease if the holder of the expiring lease has maintained his preference right qualifications and otherwise conforms to applicable rules and regulations. However, where at the time of the allocation determination the lessee under the expired lease did not own or control contiguous property as required by 43 CFR 4130.2(e)(4) (1983), he had no priority right to renewal of the lease.

Marcus Rudnick v. Bureau of Land Management, 93 IBLA 89 (July 22, 1986)

## GRAZING PERMITS AND LICENSES--Continued

### ADJUDICATION--Continued

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunyard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

Where BLM seeks to assess trespass damages and to take related action, including cancelling existing authorized grazing use, on the basis of charges that the permittee has grazed excess numbers of cattle in trespass on public land, followed by a hearing and appeal to the Board, BLM will be considered to have engaged in an adversary adjudication within the meaning of sec. 203(a)(1) of the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (Supp. III 1985).

An application for an award of attorney's fees and expenses is properly denied where, although the applicant is the prevailing party in an adjudication

GRAZING PERMITS AND LICENSES--ContinuedADJUDICATION--Continued

of trespass charges and related action taken by BLM, BLM's decision to pursue such a course of action was substantially justified by circumstantial evidence pointing to a trespass on public land.

Bureau of Land Management v. David & Bonnie Ericsson,  
98 IBLA 258 (July 7, 1987)

The Board will affirm a decision of an Administrative Law Judge reversing a BLM decision to modify the apportionment of grazing privileges in a BLM-approved rangeline agreement where the agency decision was not based on a consideration of whether there had been a radical change in circumstances by virtue of the unavailability of associated private land for grazing or other factors which would justify a modification.

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

APPEALS

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

GRAZING PERMITS AND LICENSES--ContinuedAPPEALS--Continued

An Administrative Law Judge's decision adjudicating grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100.

Lewis M. Webster v. Bureau of Land Management,  
97 IBLA 1 (Apr. 16, 1987)

Decisions regarding adoption or amendment of resource management plans or management framework plans, which are not subject to administrative review by the Board of Land Appeals, are properly distinguished from decisions adjudicating grazing applications. An appeal from a final BLM decision affirming a proposed decision denying a grazing permittee's application for change in grazing use is properly referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge pursuant to the regulations at 43 CFR 4.470 and 43 CFR 4160.4, notwithstanding the fact BLM based its decision on a planning determination not to amend the relevant plan.

Joel Stamatakis, Steve Stamatakis, 98 IBLA 4 (May 29, 1987)

Where facts and law are properly set forth and applied in Administrative Law Judge's decision affirming the BLM Area Manager's decision determining that the appellant had grazed livestock in his allotment beyond his authorized use; that the grazing of the livestock constituted a willful trespass; and that the appellant's grazing authorization should be suspended until he paid assessed trespass damages, and appellant has made no showing that the decision is in error, the decision will be affirmed.

Kent Gregersen v. Bureau of Land Management, 101 IBLA 269 (Mar. 8, 1988)

# GRAZING PERMITS AND LICENSES--Continued

## APPORTIONMENT OF FEDERAL RANGE

Where grazing licensees have executed a valid range-line agreement approved by this Department, such an agreement has generally been treated by the Department as an enforceable contract. Therefore, those terms specifically set forth in the agreement which are unmistakably clear are binding upon the parties unless changed by their mutual consent with BLM's approval.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

The Board will affirm a decision of an Administrative Law Judge reversing a BLM decision to modify the apportionment of grazing privileges in a BLM-approved rangeline agreement where the agency decision was not based on a consideration of whether there had been a radical change in circumstances by virtue of the unavailability of associated private land for grazing or other factors which would justify a modification.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

## ASSIGNMENT

A transfer of a grazing permit is not effective unless and until approved by the Bureau of Land Management. If a transfer of a grazing lease is prohibited by law, the proper action is to deny approval of the transfer. A decision cancelling a lease because the transfer is not authorized will be set aside and the case remanded for a determination regarding the ability of the assignor to retain the lease if the transfer is denied. Likewise, if a transfer is improperly approved, the action to be taken is to rescind the transfer, and not to cancel the permit.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)

# GRAZING PERMITS AND LICENSES--Continued

## BASE PROPERTY (LAND)

### Dependency by Use

The failure of a licensee of the Federal range to request grazing privileges or nonuse to the extent of earlier licenses supported by the same base property for 2 consecutive years reduces the qualifications of the base property to the extent that it has not been covered by the requests for 2 consecutive years, even though the qualifications of the base property have not been formally adjudicated.

Estate of Leonard Banegas v. Bureau of Land Management, Elias Salazar, Emma Benegas, & Edward Banegas (Inter-venors), 108 IBLA 162 (Apr. 11, 1989)

### Ownership or Control

BLM may properly reject an application to transfer grazing preferences filed by the transferee more than 90 days after the sale of the base property to that transferee since Departmental regulation 43 CFR 4110.2-3(b) requires that such application be filed within 90 days of the date of sale.

BLM may properly reject an application to transfer grazing preferences filed after the transferor has lost ownership or control of the base property to which the preferences attached by virtue of the filing of a petition in bankruptcy and a subsequent judicial sale of the property.

George Fasselin v. Bureau of Land Management, 102 IBLA 9 (Apr. 5, 1988)

### Transfers

BLM may properly reject an application to transfer grazing preferences filed by the transferee more than 90 days after the sale of the base property to that transferee since Departmental regulation 43 CFR 4110.2-3(b) requires that such application be filed within 90 days of the date of sale.

BLM may properly reject an application to transfer grazing preferences filed after the transferor has lost ownership or control of the base property to which the preferences attached by virtue of the filing of a



GRAZING PERMITS AND LICENSES--ContinuedBASE PROPERTY (LAND)--ContinuedTransfers--Continued

petition in bankruptcy and a subsequent judicial sale of the property.

George Fasselín v. Bureau of Land Management, 102 IBLA 9 (Apr. 5, 1988)

BASE PROPERTY (WATER)

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

CANCELLATION OR REDUCTION

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range

GRAZING PERMITS AND LICENSES--ContinuedCANCELLATION OR REDUCTION--Continued

improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

Joe B. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 200 (June 12, 1986)

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunvard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

BLM properly rejects an application for grazing use within an allotment where grazing is already allocated to a longstanding grazing preference, even though that preference is subject to cancellation because it is no longer supported by appropriate base property, and where BLM affords the holder of that preference an opportunity to apply for the transfer of the preference to other base property.

James E. Briggs v. Bureau of Land Management, John F. Gross, Jr., 99 IBLA 137 (Sept. 25, 1987)

Even though the elements necessary for invoking estoppel against the United States may be present, estoppel will not lie if to do so would interfere with underlying Government policies or unduly undermine the enforcement of a particular law or regulation. An approval of an assignment of grazing rights within the Capitol Reef National Park to a party not an heir of the holder of those rights on Dec. 18, 1971, contrary to the express provisions of 16 U.S.C. § 273b (1982), may be rescinded after a lapse of 9 years, as the Bureau of Land Management had no authority to approve

GRAZING PERMITS AND LICENSES--ContinuedCANCELLATION OR REDUCTION--Continued

such assignment, and to do so would be directly contrary to the intent of Congress when establishing the park.

A transfer of a grazing permit is not effective unless and until approved by the Bureau of Land Management. If a transfer of a grazing lease is prohibited by law, the proper action is to deny approval of the transfer. A decision cancelling a lease because the transfer is not authorized will be set aside and the case remanded for a determination regarding the ability of the assignor to retain the lease if the transfer is denied. Likewise, if a transfer is improperly approved, the action to be taken is to rescind the transfer, and not to cancel the permit.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)

HEARINGS

Decisions regarding adoption or amendment of resource management plans or management framework plans, which are not subject to administrative review by the Board of Land Appeals, are properly distinguished from decisions adjudicating grazing applications. An appeal from a final BLM decision affirming a proposed decision denying a grazing use is permittee's application for change in grazing use is properly referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an administrative law judge pursuant to the regulations at 43 CFR 4.470 and 43 CFR 4160.4, notwithstanding the fact BLM based its decision on a planning determination not to amend the relevant plan.

Joel Stamatakis, Steve Stamatakis, 98 IBLA 4 (May 29, 1987)

TRESPASS

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such

GRAZING PERMITS AND LICENSES--ContinuedTRESPASS--Continued

conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John N. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control--if included in this Index.)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

Pursuant to 43 CFR 2650.4-7(a)(3), an easement for public access may not be reserved across Native lands where there exists a reasonable alternative route of transportation across publicly owned lands. Where the reasonableness of an alternative route decided upon by BLM is challenged on appeal and the facts of record are insufficient to determine whether BLM's decision should be affirmed, this Board has the discretionary authority to order a hearing in the matter before an Administrative Law Judge, pursuant to 43 CFR 4.415.

State of Alaska, 86 IBLA 263 (May 10, 1985)

HEARINGS--Continued

No hearing is required to declare a mining claim invalid when there is no issue of material fact and it is clear from the record that at the time of location of the claim the land was not open to location.

Nancy Lee Mines, Inc., 89 IBLA 257 (Oct. 31, 1985)

Where the evidence is uncontradicted that respondent possessed a bald eagle (Haliaeetus leucocephalus) after Apr. 25, 1974, a finding of violation and assessment of a penalty of \$5,000 by the Administrative Law Judge will be affirmed; granting the complainant's motion to amend the original notice of violation to conform to the pleadings by substituting "after April 25, 1974," for "during the month of May 1974," was proper where such amendment did not constitute harm or unfair surprise to respondent.

The constitutional right to a speedy trial applies only to criminal proceedings; the authority of the United States to enforce a public right or protect a public interest is not lost by delay of its officers in the performance of their duties, especially where respondent's actions contribute to such delay and respondent is not prejudiced thereby.

Paul Asper v. U.S. Fish & Wildlife Service, 6 OHA 86 (Nov. 8, 1985)

Where the record does not contain sufficient evidence to determine whether the use of certain waterways is "significant" or is for purposes of "access to publicly owned lands or between communities," a hearing will be ordered on the question of whether they are "major waterways" within the meaning of 43 CFR 2650.0-5(o).

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985) 92 I.D. 620

HEARINGS--Continued

In the absence of a dispute as to a material fact, the due process rights of an applicant for a Native allotment are satisfied by an appeal to the Board of Land Appeals.

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Hondoo River & Trails, 91 IBLA 296 (Apr. 15, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law



HEARINGS--Continued

Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid

HEARINGS--Continued

Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuangaruak, Mollie Itta, Wilber Ahtuangaruak, 97 IBLA 261 (May 13, 1987)

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowning.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and

HEARINGS--Continued

void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided, no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of Land Appeals from the reservation of a public use right-of-way for a designated trail under the National

HEARINGS--Continued

Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

Where the Bureau of Land Management has assessed treble damages for a willful trespass for the unauthorized removal of sand and gravel in excess of that stated in a contract for sale of sand and gravel, but the record is unclear how BLM computed trespass volume and the Bureau's appraised value of sand and gravel deposits is challenged, there is sufficient question of fact for the Board to exercise its discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Connie Nielson, 102 IBLA 195 (May 6, 1988)

HEARINGS--Continued

Where OSMRE issues a notice of violation and more than 5 years later during a hearing held pursuant to the filing of a petition for review of a civil penalty based on that notice and a subsequent cessation order, the permittee raises for the first time lack of service of the notice of violation, that issue will be considered not timely raised. By failing to raise the issue in its petition or an amendment thereto, the permittee waived its opportunity subsequently to challenge service.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), a Native allotment applicant may amend the land description contained in the application if the description designates land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on the matter pursuant to 43 CFR 4.415.

Daniel Roehl, 103 IBLA 96 (July 12, 1988)

A request for a hearing will be granted only where there is a material issue of fact requiring resolution through the introduction of testimony or other evidence. In the absence of such an issue, no hearing is required.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is

HEARINGS--Continued

largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers in the discharge of their duties, must for reasons of public policy and under burden of proof



HEARINGS--Continued

analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

June I. Degnan (On Reconsideration), 111 IBLA 360 (Nov. 3, 1989)

In order to meet the requirements for a Phase I bond release under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269 (1982), and 30 CFR 800.40(c)(1), the operator must show that he has completed the backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. Where the record on appeal is incomplete and discloses material issues of fact regarding compliance with the requirements for a Phase I bond release, the Board will refer the case to an Administrative Law Judge for hearing pursuant to 43 CFR 4.1286.

William Helton Pullen, Jr., et al., 112 IBLA 218 (Dec. 19, 1989)

HOMESTEADS (ORDINARY)

(See also Additional Homesteads, Enlarged Homesteads, Reclamation Homesteads, Soldiers' Additional Homesteads, Stock-Raising Homesteads--if included in this Index.)

GENERALLY

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

HOMESTEADS (ORDINARY)--ContinuedAPPLICATIONS

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

CONTESTS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985) 92 I.D. 109

BLM may properly dismiss a private contest complaint challenging the validity of a homestead entry in Alaska as moot where an independent basis for cancelling the entry, which is a matter of record with BLM, arises prior to expiration of the time for filing an answer to the complaint and BLM subsequently cancels the entry on that basis. In such circumstances, the contestant has not procured cancellation of the entry and, hence, is not entitled to a preference right under 43 U.S.C. § 185 (1970).

James L. Putman, 89 IBLA 242 (Oct. 29, 1985)

HOMESTEADS (ORDINARY)--Continued

## CULTIVATION

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

## LANDS SUBJECT TO

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

When BLM has adjudicated a homestead entry application by allowing it, the rights of the applicant are deemed to relate back to the date of filing of the application and the land embraced by such application is thereby included within an allowed entry. Any applications filed after such date for the same land must be rejected.

John R. Dean, 96 IBLA 239 (Mar. 24, 1987)

Lands withdrawn for powersite purposes do not become available for homestead entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

Shoshone & Arapahoe Tribes, 102 IBLA 256 (May 23, 1988)  
95 I.D. 64

HOMESTEADS (ORDINARY)--Continued

## LANDS SUBJECT TO--Continued

BLM properly rejects an application for a homestead entry in a national forest because the Secretary of the Interior has no authority for such disposition.

Charles R. Walkemeyer, 108 IBLA 328 (May 1, 1989)

## MILITARY SERVICE

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

## MINERAL RESERVATION

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)  
93 I.D. 66

HOMESTEADS (ORDINARY)--ContinuedMINERAL RESERVATION--Continued

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), States cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

PREFERENCE RIGHTS

BLM may properly dismiss a private contest complaint challenging the validity of a homestead entry in Alaska as moot where an independent basis for cancelling the entry, which is a matter of record with BLM, arises prior to expiration of the time for filing an answer to the complaint and BLM subsequently cancels the entry on that basis. In such circumstances, the contestant has not procured cancellation of the entry and, hence, is not entitled to a preference right under 43 U.S.C. § 185 (1970).

James L. Putman, 89 IBLA 242 (Oct. 29, 1985)

RELINQUISHMENT

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

HOMESTEADS (ORDINARY)--ContinuedSECOND ENTRY

Where a homestead claimant failed to show the applicable residence and cultivation requirements were met, his homestead entry was properly cancelled. Prior to passage of the Federal Land Policy and Management Act of 1976, a preference right of entry for certain veterans was allowed; however, in such cases homestead entry must have been made subsequent to the veteran's discharge from service. Where a veteran had made a homestead entry prior to entry into service, and relinquished his homestead claim several years prior to enlistment, the veterans preference provision of 43 U.S.C. § 279 (1976) was not available to him.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

SETTLEMENT

Lands withdrawn for powersite purposes do not become available for homestead entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

Shoshone & Arapahoe Tribes, 102 IBLA 256 (May 23, 1988)  
95 I.D. 64

INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice--if included in this Index.)

GENERALLY

Confusion and potentially conflicting decisions would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

In the Matter of the Estate of Madeline Bone Wells,  
15 IBIA 165 (Apr. 1, 1987)



INDIAN PROBATE--Continued

GENERALLY--Continued

The Catholic Church is an eligible devisee of Indian trust or restricted property located on the Crow Indian Reservation, Montana.

Estate of Louella Bertha Williams Johnk, 15 IBIA 174 (Apr. 16, 1987)

Under the circumstances of this case, it was error not to seek testimony from the mother of a child born during a marriage when it was alleged that the mother's husband was not the child's father.

Estate of Elmer J. Whipple, 15 IBIA 273 (Sept. 1, 1987)

ADMINISTRATIVE LAW JUDGE

Generally

Because Administrative Law Judges (Indian Probate) are required to carry out the Federal trust responsibility to Indian tribes and individual Indians in Indian probate proceedings, they must both serve as impartial arbiters and ensure that the trustee's responsibilities to Indian parties are fulfilled.

Estate of Charles Webster Hills, 13 IBIA 188 (July 17, 1985) 92 I.D. 304

When an individual participating in an Indian probate proceeding is not represented by counsel, the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing.

The Administrative Law Judge conducting an Indian probate proceeding is required to ensure that all claims against the decedent's estate are legally allowable before approving for payment.

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

INDIAN PROBATE--Continued

ADMINISTRATIVE LAW JUDGE--Continued

Generally--Continued

When an individual participating in an Indian probate proceeding is not represented by counsel, the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing.

Estate of Blanche Russell (Hosay), 18 IBIA 40 (Oct. 31, 1989)

Authority

An administrative law judge possesses authority under 43 CFR 4.202 to decree the partial distribution of an Indian decedent's trust estate to alleviate hardship or avoid inequity. This authority extends to decreeing the partial distribution to known heirs or devisees where one or more potential heirs or devisees are missing but not presumed dead, after attributing to and setting aside for such missing person or persons the share or shares such person or persons would be entitled to if living.

Estate of Frances Ingeborg Conger (Ford) (On Review by Director), 13 IBIA 361 (Dec. 30, 1985) 92 I.D. 634

To prevent manifest error, an Administrative Law Judge may reopen an estate closed for less than 3 years on his/her own motion. 43 CFR 4.242(d).

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

INDIAN PROBATE--Continued

ADOPTION (See also CHILDREN, ADOPTED--if included in this Index.)

Generally

The adoption decree at issue in this Indian probate proceeding is invalid because it was rendered by a state court lacking jurisdiction.

Estate of James Werny Pekah, 13 IBIA 264 (Sept. 26, 1985)

For purposes of Indian probate proceedings, the Act of July 8, 1940, ch. 555, 54 Stat. 746 (25 U.S.C. § 372a (1982)), confirmed adoptions recognized by the Department of the Interior prior to the effective date of the statute, without regard to whether they were adoptions by Indian custom.

Testimony concerning Indian custom adoption or the intent of a decedent concerning an adoption is not admissible in Indian probate proceedings to attack the written record of an adoption which is in conformity with 25 U.S.C. § 372a (1982). However, evidence concerning the authenticity of the written record is admissible.

Estate of Irene Theresa Shoots Another Butterfly, 16 IBIA 213 (Sept. 20, 1988)

Under Chapter 3, section 8, of the Blackfeet Tribal Law and Order Code of 1967, adoption decrees entered by a Montana State court in 1967 involving Blackfeet tribal members will be recognized by the Department of the Interior in determining the heirs of a deceased tribal member.

Estate of Joseph No Runner, 17 IBIA 124 (May 15, 1989)

AGGRIEVED PARTIES

In order to have standing to appeal a decision entered in an Indian probate case, an individual must be an actual or presumptive heir of the decedent, a beneficiary under a will executed by the decedent, or

INDIAN PROBATE--Continued

AGGRIEVED PARTIES--Continued

a person asserting a claim against the decedent's estate.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)

Generally

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

Estate of Paul Wilford Hail, 13 IBIA 140 (Mar. 28, 1985)

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

The Board of Indian Appeals will show deference to an Administrative Law Judge's determination of the credibility of evidence and testimony.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

The person challenging an Administrative Law Judge's decision in the Departmental probate of a deceased Indian's trust estate bears the burden of proving error.

Estate of Charles James Roane, 14 IBIA 265 (Sept. 25, 1986)

Estate of Henry W. George, 15 IBIA 49 (Nov. 17, 1986)

Estate of Mary Standing Bull Curtis, 15 IBIA 213 (June 12, 1987)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Generally--Continued

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

The fact that an Indian probate appeal is pending before the Board of Indian Appeals does not give the Board jurisdiction over an allegedly related Bureau of Indian Affairs decision which has no effect on the decision on appeal.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Glenn Begay, 16 IBIA 115 (Apr. 19, 1988)

Estate of David Jay Courchene, Jr., 16 IBIA 210 (Sept. 1, 1988)

Estate of Pauline Muchene Gilbert, 17 IBIA 15 (Nov. 3, 1988)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that even assuming everything the appellant alleges is true, under no set of circumstances can the appellant prevail, the notice will be addressed without additional briefing.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Matters Considered on Appeal

The Board of Indian Appeals will not normally consider a legal issue or allegation of fact first raised on appeal. However, when a manifest error has been committed, the Board has the inherent authority of the Secretary to correct that error.

Estate of Philip Malcolm Bayou, 13 IBIA 300 (July 19, 1985)

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

Estate of Fannie Pandoah Fisher Silver, 16 IBIA 26 (Jan. 6, 1988)

Estate of Virginia Enno Poitra, 16 IBIA 32 (Feb. 3, 1988)

Estate of Glenn Begay, 16 IBIA 115 (Apr. 19, 1988)

Estate of George Neconie, 16 IBIA 120 (Apr. 21, 1988)

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

Standing to Appeal

A person who fails to file a proper petition for rehearing with the Administrative Law Judge lacks standing to appeal to the Board of Indian Appeals.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)



INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Standing to Appeal--Continued

In order to have standing to appeal a decision entered in an Indian probate case, an individual must be an actual or presumptive heir of the decedent, a beneficiary under a will executed by the decedent, or a person asserting a claim against the decedent's estate.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

Timely Filing

Under regulations promulgated by the Board of Indian Appeals in Jan. 1981, the effective date for filing a notice of appeal is the date of mailing or of personal delivery.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Under 43 CFR 4.320(a), a notice of appeal from a denial of rehearing in an Indian probate proceeding must be filed within 60 days from the date of the decision being appealed.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

An order on rehearing entered in the probate of a deceased Indian's trust or restricted estate is final if no timely appeal is filed.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

INDIAN PROBATE--Continued

APPEAL (See also PLEADING, RECONSIDERATION--if included in this Index.)--Continued

Timely Filing--Continued

An Administrative Law Judge does not have authority to limit or cut off appeal rights.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

ATTORNEYS AT LAWGenerally

The Department of the Interior is not required to appoint counsel for an Indian party in a probate proceeding in order to comply with due process requirements.

Estate of Blanche Russell (Hosay), 18 IBIA 40 (Oct. 31, 1989)

BUREAU OF INDIAN AFFAIRSGenerally

Failure of the Bureau of Indian Affairs to commence probate within 90 days of notice of an Indian's death, as required by 43 CFR 4.210(b), is not grounds to revoke approval of an Indian will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

CHILDREN, ADOPTED (See also ADOPTION, INHERITING--if included in this Index.)

Right to InheritGenerally

The inheritance rights of an adopted child are

INDIAN PROBATE--Continued

CHILDREN, ADOPTED (See also ADOPTION, INHERITING--if included in this Index.)--Continued

Right to Inherit--ContinuedGenerally--Continued

determined by the law of the state in which trust or restricted real property is located.

Estate of Victor Blackeagle, 16 IBIA 100 (Mar. 30, 1988)

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index.)

Generally

The failure of a man to acknowledge paternity of an illegitimate child to his family is not sufficient to prove he is not the father.

Estate of Paul Leon Mesteth, 14 IBIA 123 (May 30, 1986)

Although preferable, documentary evidence of paternity is not a prerequisite to a finding of paternity in Departmental probate of Indian trust estates.

Estate of Henry W. George, 15 IBIA 49 (Nov. 17, 1986)

The required proof of paternity in an Indian probate proceeding is a matter of Federal law.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

INDIAN PROBATE--Continued

CHILDREN, ILLEGITIMATE (See also INHERITING--if included in this Index.)--Continued

Right to InheritChild from Father

Under 25 U.S.C. § 371 (1982), an illegitimate Indian child is entitled to inherit trust property from the person shown to be the father.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)

Generally

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

Bureau of Indian Affairs agency Superintendents are not empowered by 25 CFR 115.11(b) to authorize disbursements from the Individual Indian Money account of a deceased Indian for funeral expenses without the approval of an Administrative Law Judge (Indian Probate).

In the Matter of the Estate of Madeline Bone Wells, 15 IBIA 165 (Apr. 1, 1987)

Allowable Items

The Administrative Law Judge conducting an Indian probate proceeding is required to ensure that all claims against the decedent's estate are legally allowable before approving for payment.

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

INDIAN PROBATE--Continued

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)--Continued

Care\_and\_Support

Under 43 CFR 4.250(d), a claim against the trust estate of a deceased Indian based on care and support must be supported by clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected.

Estate of Clement Shot, 13 IBIA 336 (Dec. 13, 1985)

A general promise of compensation given by an Indian decedent for care and support is not invalid or unenforceable in a Departmental probate proceeding merely because specific sums or terms of compensation are not recited in the promise.

Estate of Mary A. Justine Garrick, 16 IBIA 13 (Nov. 25, 1987)

Proof\_of\_Claim

When an otherwise valid claim against an Indian trust estate is challenged on the sole grounds that payments may have been made on the claim, the claim should be approved, and the Administrative Law Judge (Indian Probate) should retain jurisdiction over the matter and require additional proof as to whether any payments have been made.

Estate of Frank Doyeto, 13 IBIA 237 (Aug. 23, 1985)

Secured\_Claim

Claims presented against a deceased Indian's trust estate that are secured by non-trust assets will be considered as general creditors' claims only to the extent that the claimant shows the collateral and other non-trust assets of the estate are insufficient to cover the indebtedness.

Estate of Elsie White Wesley, 13 IBIA 326 (Nov. 15, 1985)

INDIAN PROBATE--Continued

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, if included in this Index.)--Continued

Timely\_FilingGenerally

Under 43 CFR 4.250(a) and 4.211(c), a creditor of a deceased Indian chargeable with notice of the first probate hearing must present the claim before the conclusion of that hearing, or the claim is barred.

Estate of Clement Shot, 13 IBIA 336 (Dec. 13, 1985)

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Pauline Muchene Gilbert, 17 IBIA 15 (Nov. 3, 1988)

Tort\_of\_Decedent

A claim sounding in tort against a deceased Indian's trust estate is properly rejected if it has not been reduced to judgment in a court of competent jurisdiction.

Estate of Hattie Jones Asepermy, 14 IBIA 192 (July 28, 1986)

DIVORCE (See also CLAIM AGAINST ESTATE--if included in this Index.)

Generally

If a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage.

Estate of Ramon Clifford Moreno, 15 IBIA 73 (Dec. 19, 1986)



INDIAN PROBATE--Continued

DIVORCE (See also CLAIM AGAINST ESTATE--if included in this Index.)--Continued

State Court DecreeAlimony

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

EVIDENCEGenerally

The burden of proving the error of an initial Departmental Indian probate decision is on the party challenging the decision.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

The person seeking reopening of an Indian probate bears the burden of proving error in the initial decision, even where reopening is sought for the sole purpose of establishing Indian blood quantum or Indian status.

Estate of Joseph Dupoint, 15 IBIA 59 (Nov. 28, 1986)

An affidavit to accompany Indian will executed in accordance with 43 CFR 4.233(a) constitutes prima facie evidence of due execution of the will, and places the burden of proving the will was not duly executed on the will contestants.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

INDIAN PROBATE--ContinuedEVIDENCE--ContinuedConflicting Testimony

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Hearsay Evidence

Hearsay evidence is admissible as an exception to the general rule in Departmental probate of Indian trust estates when it pertains to matters of family history, relationship, and pedigree.

Estate of Henry W. George, 15 IBIA 49 (Nov. 17, 1986)

Insufficiency of

The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was erroneous is on the person challenging the decision.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

Under the circumstances of this case, it was error not to seek testimony from the mother of a child born during a marriage when it was alleged that the mother's husband was not the child's father.

Estate of Elmer J. Whipple, 15 IBIA 273 (Sept. 1, 1987)

Newly Discovered Evidence

Newly discovered evidence is not a basis for a rehearing unless it is shown that the evidence could not, with diligent effort, have been presented at the

INDIAN PROBATE--ContinuedEVIDENCE--ContinuedNewly Discovered Evidence--Continued

original hearing, and unless the evidence is relevant to the matter at issue.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

Standing alone, the initial failure to discover evidence and witnesses before the conclusion of the original hearing in an Indian probate proceeding does not justify presentation of that evidence in a rehearing as newly discovered.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Weight of Evidence

In establishing paternity in an Indian probate proceeding when testimony is conflicting, contemporaneous documents should be given great weight in determining the facts they are intended to memorialize unless there is persuasive evidence that the documents were falsified or are erroneous.

Estate of Willard Guy, 13 IBIA 252 (Sept. 23, 1985)

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING--if included in this Index.)

Generally

An individual who has been found to be an heir of an Indian decedent does not forfeit the right to participate in the estate by failing to attend a rehearing in which that heirship is not questioned.

Estate of Paul Leon Mesteth, 14 IBIA 123 (May 30, 1986)

INDIAN PROBATE--Continued

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING--if included in this Index.)--Continued

Full and Complete

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

The exclusion of irrelevant evidence from an Indian probate hearing is not a violation of the requirement for a full and complete hearing.

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

INDIAN LAND CONSOLIDATION ACTEscheat

Based on the decision of the U.S. Supreme Court in Hodel v. Irving, U.S., 55 U.S.L.W. 4653 (U.S. May 18, 1987), that the escheat provisions of sec. 207 of the Indian Land Consolidation Act, as originally enacted, 96 Stat. 2519, are unconstitutional, escheats under that section must be disapproved in cases still pending for administrative determination.

Estate of Katie DeLaCruz & Estate of James Herbert Scarborough, 15 IBIA 198 (May 26, 1987)

INDIAN PROBATE--Continued

INDIAN REORGANIZATION ACT of June 18, 1934  
(Wheeler-Howard Act) (25 U.S.C. §§ 464-486)

Construction of Section 4

For purposes of 25 U.S.C. § 464 (1982), in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established.

A member of a non-Federally recognized Indian tribe, who is not an heir or lineal descendant of the decedent, and who has less than one-half Indian blood, is found, ineligible to receive a devise of Indian trust land on a reservation organized under the Indian Reorganization Act.

Estate of Mary Ann Snohomish Cladoosby, 15 IBIA 203  
(June 11, 1987) 94 I.D. 199

## INDIAN TRIBES

Osage

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Ernestine M. Smith et al v. Area Director, Muskogee Area Office, Bureau of Indian Affairs, 16 IBIA 153  
(June 21, 1988)

The Department of the Interior can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the Oklahoma district court's decision.

INDIAN PROBATE--Continued

## INDIAN TRIBES--Continued

Osage--Continued

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

INHERITING (See also CHILDREN, ADOPTED; CHILDREN, ILLEGITIMATE; WILLS--if included in this Index.)

Generally

In accordance with the Federal trust responsibility and the inherent authority of the Secretary to correct a manifest injustice, 43 CFR 4.320, the Board orders partial distribution of an Indian decedent's trust estate to those heirs that can be determined and retention of the remaining portion of the estate in trust status until such time as the heir or heirs to that portion can be determined.

Estate of Frances Ingeborg Conger (Ford), 13 IBIA 296  
(Oct. 16, 1985) 92 I.D. 512

Where an Indian will creates life estates in decedent's children, with remainders to the life tenants' "heirs of the body," the life tenants' heirs cannot be determined until the life tenants die.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

Non-Indian

Because 25 U.S.C. § 181 (1982), applies only to tribal property, it does not prevent a non-Indian from receiving individually owned trust or restricted property either as an heir or devisee.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)



INDIAN PROBATE--Continued

INVENTORY (See also MODIFICATION OF INVENTORY--if included in this Index.)

Property Erroneously Excluded or Included

Departmental regulations found in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's inventory of Indian trust assets during the probate of a deceased Indian's estate.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985)  
92 I.D. 247

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Max Door, 14 IBIA 128 (May 30, 1986)

In order to be successful in a legal challenge to the inventory of a deceased Indian's trust or restricted estate prepared by the Bureau of Indian Affairs, it is necessary to establish by a preponderance of the evidence that Bureau employees either did something they should not have done, or did not do something they should have done, and that such error or omission was responsible for the transaction not being completed during the life of the decedent.

Estate of Aaron Francis Walter, 16 IBIA 192 (Aug. 17, 1988)  
95 I.D. 138

KLAMATH TRIBE

Because of the Klamath Termination Act, the Bureau of Indian Affairs has no authority to hold land in Indian trust status for members of the Klamath Tribe.

Gloria Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations) & Jeanette Fay Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 344 (Dec. 27, 1985)  
92 I.D. 628

INDIAN PROBATE--ContinuedLIFE ESTATES

Title to property subject to a life estate is in the remaindermen, not in the life tenant.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

MARRIAGEGenerally

The Board of Indian Appeals follows the rule that the marital status of an individual is determined by the laws of the jurisdiction in which the relationship was created.

Estate of Henry Frank Racine, 13 IBIA 69 (Jan. 7, 1985)

If a person has entered into two marriages, a presumption arises in favor of the second marriage. The burden is upon the party attacking the validity of the second marriage to prove the first marriage had not been terminated by annulment, divorce, or death prior to the second marriage.

A marriage cannot be presumed in the face of specific evidence to the contrary.

The party attacking the continuity of a marriage bears the burden of proof.

Estate of Ramon Clifford Moreno, 15 IBIA 73 (Dec. 19, 1986)

Common Law

In order to establish a common-law marriage in the State of Montana, there must be mutual consent for parties to be presently married.

Estate of Henry Frank Racine, 13 IBIA 69 (Jan. 7, 1985)

INDIAN PROBATE--ContinuedNONRESTRICTED PROPERTY

The Department of the Interior has no authority to probate fee simple interests in land, even if they are owned by an Indian. Nontrust assets owned by Indians are subject to probate in the appropriate state or tribal court.

Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (Mar. 17, 1988)

NOTICE OF HEARINGGenerally

Under 43 CFR 4.250(a) and 4.211(c), a creditor of a deceased Indian chargeable with notice of the first probate hearing must present the claim before the conclusion of that hearing, or the claim is barred.

Estate of Clement Shot, 13 IBIA 336 (Dec. 13, 1985)

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index.)

Generally

Newly discovered evidence is not a basis for a rehearing unless it is shown that the evidence could not, with diligent effort, have been presented at the original hearing, and unless the evidence is relevant to the matter at issue.

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

A person who fails to file a proper petition for rehearing with the Administrative Law Judge lacks standing to appeal to the Board of Indian Appeals.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

INDIAN PROBATE--Continued

REHEARING (See also ADMINISTRATIVE PROCEDURE, HEARING--if included in this Index.)--Continued

Generally--Continued

Standing alone, the initial failure to discover evidence and witnesses before the conclusion of the original hearing in an Indian probate proceeding does not justify presentation of that evidence in a rehearing as newly discovered.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Pleading. Timely Filing

An untimely petition for rehearing must be denied by the Administrative Law Judge.

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

REOPENINGGenerally

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

In Re Status of Gladys Rose Charles Whims. Theima Charles Dick, August Charles, & Joseph Charles, 13 IBIA 94 (Feb. 12, 1985)

Failure to raise arguments at a hearing or in a petition for rehearing does not confer any right to seek reopening to raise those arguments, in disregard of the regulatory proscription set forth in 43 CFR 4.242(h).

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

INDIAN PROBATE--ContinuedREOPENING--ContinuedGenerally--Continued

The omission of an heir is the type of manifest injustice contemplated in the reopening provisions of 43 CFR 4.242(h).

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

The person seeking reopening of an Indian probate bears the burden of proving error in the initial decision, even where reopening is sought for the sole purpose of establishing Indian blood quantum or Indian status.

Estate of Joseph Dupoint, 15 IBIA 59 (Nov. 28, 1986)

Because there is no statutory or regulatory prescription against the filing of a petition to reopen a closed Indian probate proceeding after the entry of a Federal court decision or order in the estate, Administrative Law Judges have authority to consider such petitions under 43 CFR 4.242. However, in addition to meeting the standing requirements of 43 CFR 4.242 and showing that the cause of action was pursued with due diligence, the petitioner must also show that the petition is not barred by the entry of the appellate decision.

Estate of Julius Benter (Bender), 15 IBIA 88 (Jan. 21, 1987)

INDIAN PROBATE--ContinuedREOPENING--ContinuedGenerally--Continued

The appellant bears the burden of proving the error of the decision from which the appeal is taken.

Estate of Glenn Begay, 16 IBIA 115 (Apr. 19, 1988)

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

A claimant to an Indian probate estate closed for more than 3 years who has not filed a petition to reopen the estate has not acted with due diligence.

Estate of George Dragswolf, Jr., 17 IBIA 10 (Nov. 3, 1988)

To prevent manifest error, an Administrative Law Judge may reopen an estate closed for less than 3 years on his/her own motion. 43 CFR 4.242(d).

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

Petitions to reopen Indian probates closed for more than 3 years require compelling proof that the petitioner has acted with due diligence.

In determining whether an Indian probate closed for more than 3 years should be reopened, the Board considers, inter alia, whether individuals with knowledge of the facts, or who might be expected to oppose the petition for reopening, have died before the filing of the petition.

Estate of Julius Benter (Bender), 17 IBIA 86 (Mar. 6, 1989)



INDIAN PROBATE--ContinuedREOPENING--ContinuedGenerally--Continued

An Administrative Law Judge has authority under 43 CFR 4.242(h) to reopen an Indian probate estate that has been closed for more than 3 years.

The omission of an heir or heirs is a manifest error within the meaning of 43 CFR 4.242(h) for which a closed Indian probate should be reopened, provided the other conditions of the regulation and the due diligence requirement have been met.

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

Standing to Petition for Reopening

An adult who participated in the original probate hearing into a deceased Indian's estate normally lacks standing to petition for reopening.

Estate of Albin (Alvin) Shemamy, 13 IBIA 258 (Sept. 26, 1985)

Because there is no statutory or regulatory prescription against the filing of a petition to reopen a closed Indian probate proceeding after the entry of a Federal court decision or order in the estate, Administrative Law Judges have authority to consider such petitions under 43 CFR 4.242. However, in addition to meeting the standing requirements of 43 CFR 4.242 and showing that the cause of action was pursued with due diligence, the petitioner must also show that the petition is not barred by the entry of the appellate decision.

Estate of Julius Benter (Bender), 15 IBIA 88 (Jan. 21, 1987)

INDIAN PROBATE--ContinuedREOPENING--ContinuedStanding to Petition for Reopening--Continued

An adult who participated in the original probate hearing into a deceased Indian's estate lacks standing to petition for reopening.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

An adult who participated in the original probate hearing into a deceased Indian's trust or restricted estate lacks standing to petition for reopening.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

An Agency Superintendent is a proper party to file a petition to reopen a closed Indian probate under 43 CFR 4.242(h).

Estate of Paul Widow, 17 IBIA 107 (Apr. 3, 1989)

Waiver of Time Limitation

The Secretary of the Interior, acting through the Board of Indian Appeals and Administrative Law Judges (Indian Probate) pursuant to authority delegated in 43 CFR 4.242(h), has discretionary authority to reopen a closed Indian probate at any time under appropriate circumstances.

Estate of Woody Albert, 14 IBIA 223 (Aug. 8, 1986)

REPRESENTATION

When an individual participating in an Indian probate proceeding is not represented by counsel, the Administrative Law Judge bears a greater burden of ensuring that all relevant facts are brought out at the hearing.

Estate of Thomas Tointigh, 17 IBIA 17 (Nov. 9, 1988)

INDIAN PROBATE--ContinuedREPRESENTATION--Continued

Estate of Blanche Russell (Hosay), 18 IBIA 40 (Oct. 31, 1989)

An individual participating in a Departmental Indian probate proceeding without an attorney is still required to raise all issues and arguments at the hearing.

Estate of Henry Beavert, 18 IBIA 73 (Dec. 8, 1989)

RESULTING TRUST

Resulting purchase money trusts in Indian trust land may not be claimed by persons to whom the Federal Government owes no trust responsibility.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

SECRETARY'S AUTHORITYGenerally

The Department of the Interior has no authority to probate fee simple interests in land, even if they are owned by an Indian. Nontrust assets owned by Indians are subject to probate in the appropriate state or tribal court.

Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (Mar. 17, 1988)

SETTLEMENT (See also FAMILY ALLOWANCE AND SETTLEMENT--if included in this Index.)

Under the facts of this case, the Board of Indian Appeals will accept the appellant's statement that she does not wish to share in the decedent's estate as a compromise settlement under 43 CFR 4.207.

Estate of Willard Guy, 13 IBIA 252 (Sept. 23, 1985)

INDIAN PROBATE--ContinuedSETTLEMENT (See also FAMILY ALLOWANCE AND SETTLEMENT--if included in this Index.)--Continued

An agreement by the heir or heirs in an Indian probate proceeding to share trust or restricted property with certain named individuals who are not heirs does not create a right for other non-named individuals to also share in the property, even if the non-named individuals stand in the same relationship to the decedent as the named individuals.

Estate of Mary Lenna Whiteshirt Littlebird Ross, 16 IBIA 4 (Nov. 16, 1987)

STATE LAWGenerally

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

Estate of Douglas Leonard Ducheneaux, 13 IBIA 169 (May 31, 1985) 92 I.D. 247

The Department of the Interior has no authority to probate fee simple interests in land, even if they are owned by an Indian. Nontrust assets owned by Indians are subject to probate in the appropriate state or tribal court.

Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (Mar. 17, 1988)

Applicability to Indian Probate, Intestate Estates

When an individual owning land in Indian trust or restricted status dies without a will, the trust property passes to his or her heirs as determined with reference to state laws of intestate succession.

Estate of Sam A. Simeon, Estate of Stephen (Steven Aloysius) Simeon, 15 IBIA 135 (Mar. 20, 1987)

INDIAN PROBATE--ContinuedSTATE LAW--ContinuedApplicability to Indian Probate, Intestate Estates  
--Continued

The inheritance rights of an adopted child are determined by the law of the state in which trust or restricted real property is located.

When an Indian owning land in trust or restricted status dies without a will, the trust property passes to his or her heirs as determined with reference to state laws of intestate succession.

Estate of Victor Blackeagle, 16 IBIA 100 (Mar. 30, 1988)

When an Indian owning land in trust or restricted status dies without a will, the trust property passes to his or her heirs as determined with reference to state laws of intestate succession.

Estate of Reuben Mesteth, 16 IBIA 148 (June 15, 1988)

Applicability to Indian Probate, Testate

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Roger Wilkin Rose, 13 IBIA 331 (Dec. 4, 1985)

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

Estate of Reuben Mesteth, 16 IBIA 148 (June 15, 1988)

Pretermitted Heir

Under prior holdings of the Board of Indian Appeals, the decision in Toohnippah v. Hicel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior

INDIAN PROBATE--ContinuedSTATE LAW--ContinuedPretermitted Heir--Continued

lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

TRUST PROPERTY

Under 25 CFR 162.2(a)(3), the Department is authorized to grant leases on individually owned land on behalf of the undetermined heirs of a decedent's estate. Until the completion of probate, including all appeals proceedings, the heirs of a decedent's estate have not been finally determined.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)

Generally

Where an Indian will creates life estates in decedent's children, with remainders to the life tenants' "heirs of the body," the life tenants' heirs cannot be determined until the life tenants die.

Estate of Frank Tooahimpah, 15 IBIA 258 (Aug. 10, 1987)

Bureau of Indian Affairs instructions on the printed Indian will form and the form "Affidavit to Accompany Indian Will" are not Departmental regulations and are advisory only.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)



INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Generally--Continued

Intent alone is not sufficient to create, alter, or revoke an Indian will.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

Applicability of State Law

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Reuben Mesteth, 16 IBIA 148 (June 15, 1988)

Children, Disinheritance of

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

Construction of

The principal criterion guiding an Administrative Law Judge in construing an Indian will is always the intention of the testator, if that intention can be reasonably ascertained and it is not contrary to an established rule of law or in violation of public policy.

Estate of Paul Wilford Hall, 13 IBIA 140 (Mar. 28, 1985)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Construction of--Continued

The construction of Indian wills under the jurisdiction of the Department of the Interior is a question of Federal, not state, law.

Estate of Roger Wilkin Rose, 13 IBIA 331 (Dec. 4, 1985)

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

Estate of Reuben Mesteth, 16 IBIA 148 (June 15, 1988)

Disapproval of Will

Under prior holdings of the Board of Indian Appeals, the decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970), and in the absence of substantive probate regulations, the Department of the Interior lacks authority to disapprove an Indian will that does not provide for after-born children.

Estate of Winona June Little Hawk Garcia, 14 IBIA 106 (Apr. 4, 1986)

Failure of the Bureau of Indian Affairs to commence probate within 90 days of notice of an Indian's death, as required by 43 CFR 4.210(b), is not grounds to revoke approval of an Indian will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

Failure to Mention Child

The failure of an Indian testator to provide for a spouse, children, or other heirs in a will does not invalidate the will.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Failure to Mention Child--Continued

Bureau of Indian Affairs instructions to will drafters concerning attesting witnesses and omitted heirs are not Departmental regulations and are advisory only.

The failure of an Indian testator to mention his natural children in his will does not invalidate the will.

Estate of Alexander Charette, 15 IBIA 92 (Jan. 21, 1987)

The failure of an Indian testator to mention his natural children in his will does not invalidate the will.

An Indian testator is not required to mention and specifically disinherit all of his potential heirs merely because he mentions and specifically disinherits one or more potential heirs.

Estate of Reuben Mesteth, 16 IBIA 148 (June 15, 1988)

Bureau of Indian Affairs instructions to will drafters concerning omitted heirs are not Departmental regulations and are advisory only.

Estate of Eddie Welch Aleck, 18 IBIA 22 (Oct. 16, 1989)

Failure to Mention Spouse

The failure of an Indian testator to provide for a spouse, children, or other heirs in a will does not invalidate the will.

Estate of Eastman John Kipp, 13 IBIA 242 (Aug. 29, 1985)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Insane Delusions

An insane delusion is not merely an erroneous belief, but a belief so unreasonable that it defies rational explanation or justification.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Publication

Publication is not a prerequisite for valid execution of a will conveying Indian trust or restricted property.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

There is no requirement in 43 CFR 4.260 that an Indian testatrix publish her will by declaring to the witnesses that it is her last will and testament or that she be the person who requests the witnesses to sign.

Estate of Lena Abbie Big Bear Yellow Eagle, 17 IBIA 237 (Aug. 21, 1989)

Revocation

A testator will be held to have revoked her will when she physically destroyed the document and signed a statement stating her intention to revoke it, if she is also found to have had testamentary capacity at the time of revocation.

Estate of Stella Red Star/Swift Bird, 16 IBIA 131 (May 17, 1988)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Self-proved Wills

An affidavit to accompany Indian will executed in accordance with 43 CFR 4.233(a) constitutes prima facie evidence of due execution of the will, and places the burden of proving the will was not duly executed on the will contestants.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

State LawApplicability to Indian Probate

The authority of the Secretary of the Interior to approve an Indian will is controlled by 25 U.S.C. § 373 (1982) and regulations published in 43 CFR 4.260.262, not by state law.

Estate of Paul Wilford Hail, 13 IBIA 140 (Mar. 28, 1985)

Testamentary\_CapacityGenerally

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estate of Thomas Longtail, Jr., 13 IBIA 136 (Mar. 27, 1985)

Estate of Clarence Thompson Burke, 18 IBIA 1 (Oct. 2, 1989)

The burden of proving lack of testamentary capacity in Indian probate proceedings is on those contesting the will.

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Testamentary\_Capacity--ContinuedGenerally--Continued

The mere recitation of a medical term is not sufficient to prove lack of testamentary capacity in an Indian probate proceeding.

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property.

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

Estate of Fannie Pandoah Fisher Silver, 16 IBIA 26 (Jan. 6, 1988)

Estate of Virginia Enno Poitra, 16 IBIA 32 (Feb. 3, 1988)



INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Testamentary Capacity--ContinuedGenerally--Continued

To invalidate an Indian will for lack of testamentary capacity, it must be shown that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, it must be shown that this condition existed at the time of execution of the will.

Estate of Comer Fast Eagle, 16 IBIA 40 (Mar. 3, 1988)

Alcohol

Long-term abuse of alcohol, per se, does not deprive a testator of testamentary capacity. Rather, it is the testator's condition at the time he executed his will that is decisive. Therefore, unless a testator is shown to have been intoxicated at the time he made his will or to have suffered permanent alcohol-induced brain damage, the fact that he drank excessively is not evidence that he lacked testamentary capacity.

Estate of Comer Fast Eagle, 16 IBIA 40 (Mar. 3, 1988)

Undue Influence

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Undue Influence--Continued

own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Thomas Longtail, Jr., 13 IBIA 136 (Mar. 27, 1985)

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, particularly one involving financial matters, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

Estate of Charles Webster Hills, 13 IBIA 188 (July 17, 1985) 92 I.D. 304

Estate of Roger Wilkin Rose, 13 IBIA 331 (Dec. 4, 1985)

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

Estate of Philip Malcolm Bayou, 13 IBIA 300 (July 19, 1985)

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

In order to rebut the presumption of undue influence arising from the existence of a special confidential relationship between an Indian testator and the principal beneficiary under the will, the will proponent must show that the effects of the will were

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Undue Influence--Continued

thoroughly discussed with the testator by an objective, independent person.

Estate of Jesse Pawnee, 15 IBIA 64 (Dec. 2, 1986)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Leon Levi Harney, 16 IBIA 18 (Dec. 1, 1987)

The fact that a testator lived with the sole beneficiary of her will and was dependent upon him for her care does not in itself show that they were in a special confidential relationship so as to give rise to a presumption of undue influence.

Estate of Virginia Enno Poitra, 16 IBIA 32 (Feb. 3, 1988)

To invalidate an Indian will on the grounds of undue influence, it must be shown: (1) that the decedent was susceptible of being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING-- if included in this Index.)--Continued

Undue Influence--Continued

will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Comer Fast Eagle, 16 IBIA 40 (Mar. 3, 1988)

The burden of proof as to undue influence in Indian probate proceedings is on those contesting the will.

To invalidate an Indian will because of undue influence upon a testator, it must be shown: (1) That he was susceptible of being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Estate of Alice Jackson (John), 17 IBIA 162 (July 5, 1989)

The burden of proof as to testamentary incapacity or undue influence in Indian probate proceedings is on those contesting the will.

Estate of Clarence Thompson Burke, 18 IBIA 1 (Oct. 2, 1989)

A presumption of undue influence, arising from the existence of a special confidential relationship between an Indian testatrix and the principal beneficiary under the will, is rebutted through a showing that the effects of the will were thoroughly discussed with the testatrix by an objective, independent person.

Estate of Blanche Russell (Hosay), 18 IBIA 40 (Oct. 31, 1989)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING--  
if included in this Index.)--Continued

Witnesses, Attesting

There is no requirement in the regulations or elsewhere that the attesting witnesses to an Indian will be present at the same time or sign in the presence of the testator.

Bureau of Indian Affairs instructions to will drafters concerning attesting witnesses and omitted heirs are not Departmental regulations and are advisory only.

Estate of Alexander Charette, 15 IBIA 92 (Jan. 21, 1987)

The fact that an attesting witness is related to the testator does not invalidate the will.

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

There is no requirement that the witness of an Indian will must be a longstanding and/or intimate acquaintance of the testatrix.

Estate of Blanche Russell (Hosay), 18 IBIA 40 (Oct. 31, 1989)

## WITNESSES

Cross-examination

Parties to an Indian probate proceeding are entitled to notice of the taking of a will scrivener's deposition and to the opportunity to cross-examine him/her, in accordance with 43 CFR 4.221(e) and the Administrative Procedure Act, 5 U.S.C. § 556(d) (1982).

Estate of Lucy Buffalo Little Coyote, aka Thyra Redbird, 17 IBIA 31 (Jan. 10, 1989)

INDIAN PROBATE--Continued

## WITNESSES--Continued

Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

Estate of John Walter Few Tails, 13 IBIA 127 (Feb. 28, 1985)

Estate of Joseph Kicking Woman, 15 IBIA 83 (Jan. 14, 1987)

Estate of Ella Dautobi, 15 IBIA 111 (Feb. 18, 1987)

Estate of George Neconie, 16 IBIA 120 (Apr. 21, 1988)

INDIANS

(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate--if included in this Index.)

## GENERALLY

The Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. § 525 (1982), applies to actions taken by the Bureau of Indian Affairs.

Clyde R. Arcoren, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 307 (Oct. 29, 1985)

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands



INDIANS--ContinuedGENERALLY--Continued

anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that under no set of circumstances can it be entertained, the notice will be addressed without additional briefing.

Estate of Richard Lip & Estate of Riley M. Glenn, 15 IBIA 97 (Feb. 3, 1987)

An intervenor or joined party cannot maintain a case when the original case or parties are dismissed unless he/she is independently properly before the Board of Indian Appeals.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

When a notice of appeal to the Board of Indian Appeals shows on its face or in conjunction with the administrative or probate record that even assuming everything the appellant alleges is true, under no set of circumstances can the appellant prevail, the notice will be addressed without additional briefing.

Estate of Elmer James Whipple, 16 IBIA 225 (Sept. 27, 1988)

INDIANS--ContinuedGENERALLY--Continued

The Board of Indian Appeals will not consider issues which an appellant has not pursued on appeal. W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

A tribal member lacks standing to bring an administrative action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 250 (Aug. 24, 1989)

A person with no legal status in an appeal will not be heard to object to a settlement agreement reached between the parties.

San Juan County, Washington v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 12 (Oct. 5, 1989)

ALASKA NATIVESGenerally

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection.

State of Alaska, 86 IBLA 263 (May 10, 1985)

A determination by the Bureau of Indian Affairs to issue a certificate of ineligibility to a Native corporation claiming status as a Native group under sec. 14(h)(2) of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1613(h)(2) (1982) because the members of the corporation do not compose more than one family or household as required by 43 CFR 2653.6(a)(5) will be affirmed on appeal where the facts show that

INDIANS--ContinuedALASKA NATIVES--ContinuedGenerally--Continued

on the critical census date the four Native members were grandparents and two adult grandchildren, and that the living situation at the group locality was that of a single family or household with the grandfather as head of that family or household.

Deacon's Landing, Inc., 86 IBLA 340 (May 16, 1985)

A Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of land claimed for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land at least potentially exclusive of others. Where the evidence in the record does not establish applicant's potentially exclusive use of an allotment and a Native corporation denies the appellant's claims to the lands sought, the Bureau of Land Management shall institute contest proceedings so that evidence as to applicant's entitlement to the allotment may be presented.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

The surviving spouse of an original purchaser of a Hoonah War House has an equitable claim for that house superior to the claims of the purchaser's descendants.

John Marvin v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 260 (Sept. 10, 1986)

INDIANS--ContinuedALASKA NATIVES--ContinuedGenerally--Continued

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987)  
94 I.D. 422

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed and gives the patentee the protection of a judicial forum.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988)  
95 I.D. 314

INDIANS--ContinuedALLOTMENTSGenerally

In reviewing a decision of the Bureau of Indian Affairs concerning whether land held in Indian trust or restricted status should be partitioned, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Ritho Romo v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 16 (Oct. 5, 1989)

ATTORNEYSContracts

83 IAM 7.2(E), requiring the submission of attorney vouchers to the Department of the Interior for approval before they can be paid, is merely a restatement of what is already specifically required by 25 U.S.C. § 82.

To the extent that the fixing of fees for attorney contracts was contemplated under both 25 U.S.C. §§ 81 and 476, sec. 476 does not supersede sec. 81. Application of those requirements of sec. 81 relating to the fixing of fees to attorney contracts entered into under sec. 476 is a reasonable interpretation of the Secretary's responsibilities with respect to the "fixing of fees." The application of such requirements constitutes, at most, an interpretative rule that need not be published in the Federal Register.

White Mountain Apache Tribe v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 16 IBIA 51 (Mar. 18, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving,

INDIANS--ContinuedATTORNEYS--ContinuedContracts--Continued

or conditionally approving an attorney's contract is final for purposes of judicial review.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

Fees

By regulation, the Department has interpreted the Equal Access to Justice Act to exclude all proceedings except those required by statute to be conducted under 5 U.S.C. § 554 (1982).

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

BLOOD QUANTUM

The Board of Indian Appeals has jurisdiction to review decisions by the Bureau of Indian Affairs concerning applications for certificates of degree of Indian blood.

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974),



INDIANS--ContinuedBLOOD QUANTUM--Continued

an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986) 93 I.D. 13

CITIZENSHIP/NATIONALITY

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

In Re Status of Gladys Rose Charles Whims, Thelma Charles Dick, August Charles, & Joseph Charles, 13 IBIA 94 (Feb. 12, 1985)

CIVIL RIGHTSIndian Civil Rights Act of 1968

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

INDIANS--ContinuedCONTRACTSGenerally

The Bureau of Indian Affairs has discretion to determine whether an existing Indian contract should be modified, unless a legal right to modification is granted, e.g., by Federal statute, regulations, or the contract itself.

Baldy & Baldy, Inc. v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 322 (Nov. 14, 1985)

As is the initial decision whether or not to approve a contract affecting an Indian tribe, the decision whether or not the contract should be extended, and, if extended, the terms of the extension, are matters committed to the discretion of the Secretary of the Interior.

Quinault Allottees Ass'n v. Area Director, Portland Area Office, Bureau of Indian Affairs, 14 IBIA 149 (July 2, 1986)

Formation and ValidityBids and AwardsGenerally

The appeal procedures in 25 CFR Part 2 do not apply to the protest of an award of a Federal procurement contract by a Bureau of Indian Affairs contracting officer, because procedures for such protests are set out in the Federal Acquisition Regulations, 48 CFR Parts 33.1 and 1433.1. The Board of Indian Appeals lacks jurisdiction over such protests.

United Sioux Tribes Development Corp. v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 286 (Sept. 14, 1989)

INDIANS--Continued

## DOMESTIC RELATIONS

Generally

Regulations in 25 CFR 20.13 provide that, following a request for covered financial assistance, an applicant may either request a hearing within 20 days or file an appeal within 30 days. If an unfavorable decision is rendered after a hearing, an appeal may still be filed.

Sylvester & Shirley LaRocque v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 80 (Dec. 19, 1989)

## ECONOMIC ENTERPRISES

Buy Indian Act

The meaning of "100 percent Indian control" of a business as used under the Buy Indian Act, 25 U.S.C. § 47 (1982), includes not only apparent control, but also actual control as evidenced by some measure of active participation in the business that would tend to increase Indian self-sufficiency.

Native American Management Services, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 99 (Feb. 19, 1985) 92 I.D. 99

For purposes of eligibility under the Buy Indian Act, 25 U.S.C. § 47 (1982), an "Indian" must be a member of a Federally recognized Indian tribe or otherwise considered to be an Indian by a Federally recognized Indian tribe with which affiliation is claimed.

Northwest Computer Supply v. Acting Deputy to the Ass't Secretary--Indian Affairs (Operations), 16 IBIA 125 (May 12, 1988)

INDIANS--Continued

## EDUCATION AND TRAINING

Vocational Training

In order to receive adult vocational training through the Bureau of Indian Affairs, an applicant must be an adult Indian residing on or near the reservation.

Todd R. Kirkie v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 275 (Sept. 13, 1989)

Under 25 CFR 27.1(h)(3) and 27.2, participation in the Bureau of Indian Affairs' adult vocational training program is limited to full-time institutional training, i.e., a course load of 12 semester hours or its equivalent.

Gary Colbert v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 92 (Dec. 22, 1989)

## ENROLLMENT/TRIBAL MEMBERSHIP

Unless the Department of the Interior is otherwise given authority to review questions of tribal membership, tribes conclusively determine membership for those purposes over which they have complete control. However, when Departmental action is authorized based upon questions of tribal membership, the Department has authority to consider enrollment questions.

A case before the Board of Indian Appeals which raises a genuine issue of material fact or facts will be referred for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

INDIANS--ContinuedFEDERAL RECOGNITION OF INDIAN TRIBESGenerally

For purposes of eligibility under the Buy Indian Act, 25 U.S.C. § 47 (1982), an "Indian" must be a member of a Federally recognized Indian tribe or otherwise considered to be an Indian by a Federally recognized Indian tribe with which affiliation is claimed.

Northwest Computer Supply v. Acting Deputy to the Ass't Secretary--Indian Affairs (Operations), 16 IBIA 125 (May 12, 1988)

Only Federally recognized Indian tribes qualify as tribal applicants for grants under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982).

Aroostook Micmac Council, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 17 IBIA 177 (July 11, 1989)

Recognition

Federal recognition of Indian tribes is governed by 25 CFR Part 83, which places such recognition within the purview of the Assistant Secretary for Indian Affairs, subject to review by the Secretary. Therefore, the Board of Indian Appeals does not have authority to review cases involving recognition of Indian tribes.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

FINANCIAL MATTERSGenerally

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it

INDIANS--ContinuedFINANCIAL MATTERS--ContinuedGenerally--Continued

received in error, so that accounts may be established for the minors.

The Bureau of Indian Affairs must be able to show by convincing evidence that it deposited judgment fund per capita payments belonging to minor members of a tribe into a tribal trust account before the tribe is obligated to repay the funds.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

Financial Assistance

Under 25 U.S.C. § 1463 (1982), the decision whether to approve a loan from the Indian Revolving Loan Fund is a decision requiring the exercise of discretion.

Angelita Aunko Hamilton v. Acting Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 152 (June 21, 1989)

To be eligible to receive a grant under the Indian Business Development Program, the applicant must not, in the opinion of the Secretary or his delegate, be able to obtain adequate financing from other sources.

Martha Billings, dba Galena Commercial Co., v. Acting Juneau Area Director, Bureau of Indian Affairs, 17 IBIA 158 (June 29, 1989)

Decisions concerning whether a tribe's application for a Core Management grant should be funded are committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the



INDIANS--ContinuedFINANCIAL MATTERS--ContinuedFinancial Assistance--Continued

Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Lower Elwha Tribe v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 50 (Nov. 8, 1989)

Caddo Indian Tribe of Oklahoma v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 63 (Nov. 16, 1989)

Stillaguamish Tribe v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 89 (Dec. 20, 1989)

Regulations in 25 CFR 20.13 provide that, following a request for covered financial assistance, an applicant may either request a hearing within 20 days or file an appeal within 30 days. If an unfavorable decision is rendered after a hearing, an appeal may still be filed.

Sylvester & Shirley LaRocque v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 80 (Dec. 19, 1989)

Under 25 CFR 27.1(h)(3) and 27.2, participation in the Bureau of Indian Affairs' adult vocational training program is limited to full-time institutional training, i.e., a course load of 12 semester hours or its equivalent.

Gary Colbert v. Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 92 (Dec. 22, 1989)

When the administrative record fails to demonstrate that an applicant was clearly advised of the necessity to provide particular information in a grant application, and the applicant's failure to provide that information could have affected the decision on whether to approve the application, a decision denying the application will be vacated and the matter remanded

INDIANS--ContinuedFINANCIAL MATTERS--ContinuedFinancial Assistance--Continued

for development of an adequate record and issuance of a new decision.

Delaware Tribe of Western Oklahoma v. Acting Anadarko Area Director, Bureau of Indian Affairs, 18 IBIA 98 (Dec. 27, 1989)

Individual Indian Money Accounts

Disbursements from a minor's Individual Indian Money account may be made in accordance with a plan approved by the Secretary, showing that the funds will be expended in accordance with the best interests of the minor.

Yolanda Chormicle Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 247 (Sept. 13, 1985)

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it received in error, so that accounts may be established for the minors.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

HOUSINGHome Improvement Program Funds

The decision whether to waive the regulations

INDIANS--ContinuedHOUSING--ContinuedHome\_Improvement\_Program\_Funds--Continued

governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 243 (Sept. 2, 1986)

HUNTING, FISHING, AND GATHERING RIGHTSGenerally

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

The use of Columbia River in-lieu fishing sites for permanent residences or for the permanent storage of trailers and other personal property violates 25 CFR Part 248.

David Schappay, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 100 (Apr. 4, 1986) 93 I.D. 176

INDIAN CHILD WELFARE ACT OF 1978Financial Grant ApplicationsGenerally

Only Federally recognized Indian tribes qualify as tribal applicants for grants under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982).

A state-recognized Indian tribe may apply for a grant under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934 (1982), if it qualifies as an off-reservation Indian organization.

In implementing a grant awarded under Title II of the Indian Child Welfare Act, 25 U.S.C. §§ 1931-1934

INDIANS--ContinuedINDIAN CHILD WELFARE ACT OF 1978--ContinuedFinancial Grant Applications--ContinuedGenerally--Continued

(1982), an off-reservation Indian organization may limit its service population to its own members.

Aroostook Micmac Council, Inc. v. Eastern Area Director, Bureau of Indian Affairs, 17 IBIA 177 (July 11, 1989)

INDIAN PREFERENCEGenerally

Examination of the text, legislative history, purpose, administrative interpretation, and judicial construction of sec. 12 of the IRA, 25 U.S.C. § 472, leads to the conclusion that Indian preference applies to the Bureau of Indian Affairs within the Department of the Interior and to no other agency or position within the Department.

The Scope of Indian Preference Under The Indian Reorganization Act, M-36960 (June 10, 1988) 96 I.D. 1

Buy Indian Act

For purposes of eligibility under the Buy Indian Act, 25 U.S.C. § 47 (1982), an "Indian" must be a member of a Federally recognized Indian tribe or otherwise considered to be an Indian by a Federally recognized Indian tribe with which affiliation is claimed.

Northwest Computer Supply v. Acting Deputy to the Ass't Secretary--Indian Affairs (Operations), 16 IBIA 125 (May 12, 1988)

INDIANS--Continued

## INDIAN REORGANIZATION ACT

Examination of the text, legislative history, purpose, administrative interpretation, and judicial construction of sec. 12 of the IRA, 25 U.S.C. § 472, leads to the conclusion that Indian preference applies to the Bureau of Indian Affairs within the Department of the Interior and to no other agency or position within the Department.

The Scope of Indian Preference Under The Indian Reorganization Act, M-36960 (June 10, 1988) 96 I.D. 1

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1982), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

## INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later

INDIANS--Continued

## INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT--Continued

Generally--Continued

decides that the approval was improper, provided the approval was not clearly contrary to law.

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

Appeal of Devil's Lake Sioux Tribe, IBCA-1953 (Mar. 25, 1987) 94 I.D. 101

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

Tohono O'odham Nation (formerly Papago Tribe of Arizona) v. Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 147 (Mar. 31, 1987) 94 I.D. 120

On reconsideration, the Board concludes that since the contract before it contains no termination for convenience clause and since the Government did not establish that it met the requirements of any other clause permitting modification or termination of the contract, the requirements of the contract were not met, and the contractor is entitled to recover in full



INDIANS--ContinuedINDIAN SELF-DETERMINATION AND EDUCATION  
ASSISTANCE ACT--ContinuedGenerally--Continued

the expenses it incurred in performing its work under the contract.

Appeal of Navajo Community College (On Reconsideration), IBIA-1834 (May 8, 1987)

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedures in 25 CFR Part 271.

Under 25 CFR 271.25 and 271.82, jurisdiction to review a declination to contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982) rests with the Assistant Secretary--Indian Affairs. Declination to contract issues raised in an appeal pending before the Board of Indian Appeals are properly dismissed and referred to the Assistant Secretary.

The remedy for a violation of the time limits set forth in 25 CFR Part 271 for action by the Bureau of Indian Affairs on contract application filed under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450f-450n (1982), as set forth in 25 CFR 271.28, is the right of an applicant to file an appeal with the next higher Bureau official as soon as the time limit has been exceeded.

The Tule River Indian Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 21 (Dec. 7, 1988)

## JUDGMENT FUNDS

Where the Bureau of Indian Affairs has erroneously deposited into a tribal trust account certain judgment fund per capita payments which should have been placed in Individual Indian Money accounts for two minor members of the tribe, and the funds are still in the tribal account, the tribe should repay the amounts it

INDIANS--Continued

## JUDGMENT FUNDS--Continued

received in error, so that accounts may be established for the minors.

The Bureau of Indian Affairs must be able to show by convincing evidence that it deposited judgment fund per capita payments belonging to minor members of a tribe into a tribal trust account before the tribe is obligated to repay the funds.

Kaibab Band of Paiute Indians v. Acting Area Director, Phoenix Area Office, Bureau of Indian Affairs, 15 IBIA 277 (Sept. 25, 1987)

Where an Indian tribe's judgment fund distribution plan requires that the funds be expended only as approved by the tribal membership, the Bureau of Indian Affairs, as trustee for the funds, has the authority to decline to recognize the results of a tribal mail survey conducted for the purpose of approving expenditure of the funds, upon reasonably concluding that the results do not represent the informed views of the tribal membership.

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibility under Federal law for ensuring the proper performance of the tribe's judgment fund distribution plan requires it to make an independent judgment concerning whether the tribal membership has approved a proposal for expenditure of the funds.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

## LANDS

Generally

The Bureau of Indian Affairs is not a tenant in

INDIANS--ContinuedLANDS--ContinuedGenerally--Continued

common with the non-trust holders of fee interests in an Indian allotment.

Gloria Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations) & Jeanette Fay Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 344 (Dec. 27, 1985)  
92 I.D. 628

The inventory of a deceased Indian's trust or restricted property prepared by the Bureau of Indian Affairs for use in probating the decedent's Indian trust estate properly does not include lands that were deeded to another person during the decedent's lifetime.

Estate of Max Door, 14 IBIA 128 (May 30, 1986)

Lands set apart as an Indian reservation cease to be a part of the public domain, and a mining claim located on Indian lands not opened to mineral entry is null and void ab initio.

Haldon Mining, 94 IBIA 93 (Oct. 1, 1986)

Monies deposited with the Bureau of Indian Affairs for lease rentals for a specified period of time during which lease applications were being considered and the lease applicant was using the properties are properly paid to the Indian tribal and/or individual landowners as rental for that period of time even though the lease negotiations ultimately fail.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

INDIANS--ContinuedLANDS--ContinuedAcquired\_Lands

For the purposes of tribal acquisition of land in trust status, 25 CFR 151.2(f) provides that in Oklahoma "Indian reservation" means that area of land constituting the former reservation of the tribe.

Thlopthlocco Tribal Town v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 302 (Oct. 25, 1985)

Under 25 U.S.C. § 1300b-14 (1982), the Secretary of the Interior has authority to take more than 100 acres in Maverick County, Texas, into Indian trust status for the benefit of the Texas Band of Kickapoo Indians.

Kickapoo Tribe of Oklahoma v. Superintendent, Shawnee Agency, Bureau of Indian Affairs, 13 IBIA 339 (Dec. 16, 1985)

AllotmentsAlienation

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

Theodore B. White v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 142 (Mar. 27, 1987)

Franklin Escalanti v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 290 (Sept. 15, 1989)

INDIANS--ContinuedLANDS--ContinuedAllotments--ContinuedAlienation--Continued

In determining whether to approve the sale of a minor Indian's trust land to another Indian, the Bureau of Indian Affairs' trust duty is solely to the minor for whom the land is held in trust.

Perian Smith, Conservator for Andria Dian Smith (Minor) v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 36 (Oct. 26, 1989)

Right to Receive

Under the Act of Apr. 1, 1914, 38 Stat. 582, 593, the Department of the Interior had the discretion to determine whether or not to continue allotment on the Fort Peck Indian Reservation.

Under the circumstances of this case, the requirements of due process have been met through the administrative review procedures set forth in 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

Delores Jean DeMarrias Martineau v. Area Director, Billings Area Office, Bureau of Indian Affairs, 16 IBIA 104 (Apr. 4, 1988)

Allotments\_on\_Public\_DomainGenerally

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBIA 343 (Mar. 22, 1985)  
92 I.D. 140

INDIANS--ContinuedLANDS--ContinuedAllotments\_on\_Public\_Domain--ContinuedGenerally--Continued

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982) nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

James Leland Wallace, 100 IBIA 70 (Nov. 30, 1987)

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982) is deemed to have exhausted his rights under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

Heirs of George Martinez, Heirs of Arthur Chavez, 103 IBIA 375 (Aug. 15, 1988)

Classification

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBIA 343 (Mar. 22, 1985)  
92 I.D. 140



INDIANS--ContinuedLANDS--ContinuedAllotments\_on\_Public\_Domain--ContinuedLands Subject to

Where a Paiute Indian files an Indian allotment application for land located in New Mexico, pursuant to sec. 9 of the Act of Dec. 22, 1974, 25 U.S.C. § 640d-8 (1982), which provides only for the allotment of certain land in Arizona to qualified Paiute Indians, the application is properly rejected.

Claudius A. Hatch, 91 IBLA 80 (Mar. 10, 1986)

BLM properly rejects an application for an Indian allotment filed pursuant to sec. 4 of the Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), where, at the time the application was filed, the land was segregated, in accordance with 43 CFR 2711.1-2(d), from appropriation under the public land laws by application in the Federal Register of notice of realty action offering the land for sale.

Frank F. Salsedo, 99 IBLA 170 (Oct. 2, 1987)

Settlement

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the

INDIANS--ContinuedLANDS--ContinuedAllotments\_on\_Public\_Domain--ContinuedSettlement--Continued

vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

Where BLM has classified certain lands for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), and issued a certificate of allotment, it may establish a reasonable time in which the allottee must demonstrate settlement of the land in question. Two years from issuance of the certificate is such a reasonable time.

Where lands are classified for disposal under sec. 4 of the General Allotment Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), as irrigable lands and a certificate of allotment issued, settlement of those lands must include acts to establish the allottee's good faith and intention to, in fact, irrigate and cultivate crops on the land in question.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

Fair\_Rental\_Value

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative

INDIANS--ContinuedLANDS--ContinuedFair\_Rental\_Valu--Continued

record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, inter alia, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

Fee Lands

Because of the Klamath Termination Act, the Bureau of Indian Affairs has no authority to hold land in Indian trust status for members of the Klamath Tribe.

Gloria Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations) & Jeanette Fay Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 344 (Dec. 27, 1985) 92 I.D. 628

Non-Indians who inherit interests in Indian trust or restricted property take those interests in fee simple, rather than trust or restricted status. Once the interests have passed out of trust or restricted

INDIANS--ContinuedLANDS--ContinuedFee Lands--Continued

status, they remain in nontrust, nonrestricted status even if they are later inherited by an Indian.

Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (Mar. 17, 1988)

Non-Indian\_Acquisition

Non-Indians who inherit interests in Indian trust or restricted property take those interests in fee simple, rather than trust or restricted status. Once the interests have passed out of trust or restricted status, they remain in nontrust, nonrestricted status even if they are later inherited by an Indian.

Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (Mar. 17, 1988)

Rights-of-Way

In regulations set forth at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land.

Under 25 CFR 169.19, prior written tribal consent is required for the renewal of a right-of-way across tribal lands.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the

INDIANS--ContinuedLANDS--ContinuedRights-of-Way--Continued

rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

When an easement deed for a right-of-way over tribal land authorizes the grantee to assign its interest to another party, and the assignee is using the right-of-way in accordance with the terms of the easement deed, the right-of-way may not be cancelled for non-use or abandonment.

City of Elko, Nevada v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 54 (Nov. 14, 1989)

INDIANS--ContinuedLANDS--ContinuedTribal Lands

Determination of the use of its own land is peculiarly the province of an Indian tribe.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

When an easement deed for a right-of-way over tribal land authorizes the grantee to assign its interest to another party, and the assignee is using the right-of-way in accordance with the terms of the easement deed, the right-of-way may not be cancelled for non-use or abandonment.

City of Elko, Nevada v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 54 (Nov. 14, 1989)



INDIANS--ContinuedLANDS--ContinuedTrust Acquisitions

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that each of these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

City of Eagle Butte, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 192 (July 25, 1989) 96 I.D. 328

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Indian tribes and individuals have no legal right under 25 U.S.C. § 409a (1982), 25 U.S.C. § 465 (1982), or 25 U.S.C. § 501 (1982), to have land acquired in trust status for their benefit. Rather, under these statutory provisions, the determination whether to acquire the land is committed to the discretion of the Secretary of the Interior.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a

INDIANS--ContinuedLANDS--ContinuedTrust Acquisitions--Continued

trust acquisition application must appear in the administrative record.

Naomi Haikey Eades v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 198 (July 26, 1989)

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that each of these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

When the administrative record fails to show that the Bureau of Indian Affairs considered a factor or factors listed in 25 CFR 151.10 in approving a request to acquire land in trust status, the matter is appropriately remanded to the Bureau for such consideration.

Day County, South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 204 (July 26, 1989)

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian

INDIANS--ContinuedLANDS--ContinuedTrust Acquisitions--Continued

tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that these factors were considered appear in the administrative record.

Roberta C. Weckeah Bradley v. Anadarko Area Director, Bureau of Indian Affairs, 17 IBIA 210 (Aug. 2, 1989)

A person with no legal status in an appeal will not be heard to object to a settlement agreement reached between the parties.

San Juan County, Washington v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 12 (Oct. 5, 1989)

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a trust acquisition application must appear in the administrative record.

John Ross, Jr. v. Acting Muskogee Area Director, Bureau of Indian Affairs, 18 IBIA 31 (Oct. 20, 1989)

INDIANS--ContinuedLANDS--ContinuedTrust Acquisitions--Continued

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Nothing in the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716 (1982), precludes the acquisition of the settlement lands in trust status for the benefit of the Narragansett Indian Tribe of Rhode Island or imposes requirements for acquisition beyond those contained in 25 CFR Part 151.

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a trust acquisition application must appear in the administrative record.

Town of Charlestown, Rhode Island v. Eastern Area Director, Bureau of Indian Affairs, 18 IBIA 67 (Dec. 5, 1989)

LAW AND ORDERGenerally

Neither the Board of Indian Appeals nor the Bureau of Indian Affairs has jurisdiction over issues that are entrusted to tribal courts.

The Bureau of Indian Affairs is not required to take action against an Indian tribe under 25 U.S.C. § 229 (1982) because of a property dispute with a non-Indian.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

INDIANS--Continued

## LAW AND ORDER--Continued

Civil Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

Muscogee (Creek) Nation v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 13 IBIA 211 (July 22, 1985) 92 I.D. 309

The adoption decree at issue in this Indian probate proceeding is invalid because it was rendered by a state court lacking jurisdiction.

Estate of James Werny Pekah, 13 IBIA 264 (Sept. 26, 1985)

Criminal Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

Muscogee (Creek) Nation v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 13 IBIA 211 (July 22, 1985) 92 I.D. 309

Tribal Constitutions, Bylaws, and Ordinances

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of

INDIANS--Continued

## LAW AND ORDER--Continued

Tribal Constitutions, Bylaws, and Ordinances--Continued

temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

When a tribal governing body legislates to disenfranchise members who fall within a class of voters described in the tribal constitution, the legislation must be carefully scrutinized for validity.

In certain narrow circumstances, tribal legislation which disenfranchises members who fall within a class of voters described in the tribal constitution may be upheld.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

The Bureau of Indian Affairs has the right to apply tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Where a tribal constitution is clear upon its face, and the ordinary meaning of its language admits of only a single interpretation, the Bureau of Indian Affairs correctly applied unambiguous provisions of the constitution establishing the powers of the tribal government's various committees when it refused to approve a budget prepared by the Kiowa, Comanche and Apache Intertribal Land Use Committee.

Kiowa, Comanche & Apache Intertribal Land Use Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 207 (Aug. 1, 1986)



INDIANS--ContinuedLAW AND ORDER--ContinuedTribal Constitutions, Bylaws, and Ordinances--Continued

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

The Bureau of Indian Affairs has the right to interpret tribal law in order to ensure that tribal action in which the Bureau has an interest is consistent with that law.

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

LEASES AND PERMITSGenerally

The construction of a contract approved by the Bureau of Indian Affairs on behalf of an Indian or Indian tribe is a question of Federal law. In the absence of Federal cases on point, state law may be used as an indication of the general common law.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Approval of an Indian lease by the Bureau of Indian Affairs does not constitute approval of documents not explicitly made part of the lease.

The Bureau of Indian Affairs has no statutory or regulatory authority to take action against an Indian lessor for an alleged lease violation.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

INDIANS--ContinuedLEASES AND PERMITS--ContinuedGenerally--Continued

The Bureau of Indian Affairs has no authority to grant a lease of tribal land when the proper tribal official or governing body has determined not to approve the lease.

Oliver Redfield v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBIA 208 (Apr. 2, 1986) 93 I.D. 159

In appeals under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

When the language of a lease of Indian trust or restricted property is ambiguous, the intent of the parties must be ascertained by an examination of

INDIANS--ContinuedLEASES AND PERMITS--ContinuedGenerally--Continued

the circumstances surrounding the execution of the lease.

The construction of a contract approved by the Bureau of Indian Affairs on behalf of an Indian or Indian tribe is a question of Federal law. In the absence of Federal cases on point, state law may be used as an indication of the general common law.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)

In appeals under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of was erroneous or not supported by substantial evidence.

Melissa M. Peall v. Acting Area Director, Portland Area Office, Bureau of Indian Affairs, 16 IBIA 163 (June 21, 1988)

Under 25 CFR 162.2(a)(3), the Department is authorized to grant leases on individually owned land on behalf of the undetermined heirs of a decedent's estate. Until the completion of probate, including all appeals proceedings, the heirs of a decedent's estate have not been finally determined.

Estate of Ella Sarah Case Barnes, 17 IBIA 72 (Feb. 15, 1989)

Monies deposited with the Bureau of Indian Affairs for lease rentals for a specified period of time during which lease applications were being considered and the lease applicant was using the properties are properly paid to the Indian tribal and/or individual landowners as rental for that period of time even though the lease negotiations ultimately fail.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 183 (July 12, 1989)

INDIANS--ContinuedLEASES AND PERMITS--ContinuedGenerally--Continued

Under 25 U.S.C. § 415 (1982), any lease of Indian trust or restricted land that is not approved by the Secretary of the Interior or his authorized representative is void ab initio, has no force or effect, and grants no rights to either the attempted lessor or lessee.

Claire P. Smith v. Acting Billings Area Director, Bureau of Indian Affairs, 17 IBIA 231 (Aug. 18, 1989)

Amendments

Where a lease of Indian land requires the unanimous consent of the lessors for changes affecting the entitlement of lessors to rent, the Bureau of Indian Affairs may not approve a document purporting to effect such a change, which is signed only by a majority of the lessors.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

Arbitration

A lessee of Indian lands does not have a right to invoke the lease's arbitration clause after the lease has been canceled.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Cancellation or Revocation

In order for an automatic termination lease provision to be upheld, it must clearly indicate that automatic termination is intended, the circumstances bringing about automatic termination, and the consequences of the termination.

INDIANS--ContinuedLEASES AND PERMITS--ContinuedCancellation\_or Revocation--Continued

Cancellation of an Indian lease is effective when issued, unless, as in this case, the lease specifically provides for a different effective date.

Pyramid Lake Paiute Tribe of Indians v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 162 (May 29, 1985)

A lessee of Indian lands does not have a right to invoke the lease's arbitration clause after the lease has been canceled.

The Bureau of Indian Affairs is not required to give the lessee of Indian trust land a reasonable time in which to cure a breach of the lease when it is determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

The Bureau of Indian Affairs is not required to give the lessee of Indian trust or restricted land a reasonable time in which to cure a breach of the lease when it is determined in accordance with 25 CFR 162.14 that the breach cannot be cured.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)

INDIANS--ContinuedLEASES AND PERMITS--ContinuedCancellation\_or Revocation--Continued

A decision by the Bureau of Indian Affairs to revoke a contract made revocable by its express provisions will be upheld when the decision is in accordance with all requirements of the revocation clause.

Imperial County, California v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 271 (Sept. 5, 1989)

Development Leases

When the administrative record does not contain the necessary factual basis for a determination of whether a long-term development lease of Indian trust land should be canceled, the matter will be referred for an evidentiary hearing and recommended decision.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 111 (May 21, 1986)

Where a lease of Indian land requires the unanimous consent of the lessors for changes affecting the entitlement of lessors to rent, the Bureau of Indian Affairs may not approve a document purporting to effect such a change, which is signed only by a majority of the lessors.

Falcon Lake Properties v. Ass't Secretary--Indian Affairs, 15 IBIA 286 (Sept. 29, 1987)

Under the circumstances of this case, the lessee of Indian trust or restricted property breached the lease by failing to attempt in good faith to complete development of the leased premises.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)



INDIANS--ContinuedLEASES AND PERMITS--ContinuedFarming and Grazing

A prior lessee has no preference right to a new lease of Indian trust land for cattle grazing. However, when such lessee has made a timely application for a new lease of land he was previously leasing, he has the right under 5 U.S.C. § 588(c) (1982) to remain on the land until the Bureau of Indian Affairs has determined whether a new lease will be issued to him.

A prior lessee of Indian trust grazing land who agrees to the establishment of an escrow account for the payment of annual rents after the expiration of his leases and until his lease renewal applications can be processed, is not a trespasser on those tracts for which he has sought lease renewals.

W. Woodrow Metzger v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 314 (Nov. 7, 1985)

When the Bureau of Indian Affairs undertakes to assist landowners in negotiating a lease pursuant to 25 CFR 162.6, it must ensure that the information it conveys to the landowners concerning lease offers is current and accurate.

Joel LeRoy Henderson v. Area Director, Portland Area Office, Bureau of Indian Affairs, 16 IBIA 169 (July 14, 1988)

Negotiated Leases

If no approved lease of Indian trust land is outstanding when the heirs or devisees of an Indian decedent are determined, those heirs or devisees have authority to negotiate a lease of the property, notwithstanding prior negotiations by the Superintendent in accordance with 25 CFR 162.2.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

INDIANS--ContinuedLEASES AND PERMITS--ContinuedRental Rates

The mere fact that a rental rate adjustment is lower than the rate suggested in an appraisal of the property does not justify the lower rate. In order to be supported by substantial evidence, the decision imposing the rental rate must show the reasons for the adjustment actually made.

Bien Mur Indian Market Center v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 231 (Aug. 11, 1986)

When the administrative record does not contain the necessary factual basis for a determination of whether a rental adjustment was based on substantial evidence, the matter will be referred for an evidentiary hearing and recommended decision.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 5 (Oct. 8, 1986)

The role of the Board of Indian Appeals in reviewing a rental adjustment in a lease of Indian land is to determine whether the adjustment is reasonable, that is, whether it is supported by law and substantial evidence. If it is reasonable, the Board will not substitute its judgment for that of the Bureau of Indian Affairs, but the Board must overturn an adjustment that is not reasonable.

A rental adjustment which applies the percentage increase in fair annual rental between two lease periods to a negotiated rent which was nearly twice the amount of the fair annual rental at the time it was negotiated is not reasonable.

Frank Gamble v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 101 (Feb. 5, 1987)

INDIANS--Continued

## LEASES AND PERMITS--Continued

Rental\_Rates--Continued

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

Navajo Nation v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 179 (May 15, 1987) 94 I.D. 172

A rental adjustment to a lease of Indian land, which is based on an appraisal employing a sales-price comparison methodology, will be affirmed if it is reasonable that is, if it is supported in law and by substantial evidence.

Kelly Oil Co. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 249 (Aug. 5, 1987)

An agreement reducing the rental rate due on a lease of Indian trust property will be enforced.

Patricia A. Quisno v. Billings Area Director, Bureau of Indian Affairs, 17 IBIA 278 (Sept. 13, 1989)

INDIANS--Continued

## LEASES AND PERMITS--Continued

Rental\_Rates--Continued

25 CFR 162.5(b)(2) vests the Secretary with discretion to approve the lease of tribal land to the Bureau of Indian Affairs, *inter alia*, at a nominal rental. In light of this regulatory provision, the decision whether the Bureau should pay fair market value to lease tribal land is committed to the Bureau's discretion. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

San Carlos Apache Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 299 (Sept. 21, 1989)

Secretarial Approval

If no approved lease of Indian trust land is outstanding when the heirs or devisees of an Indian decedent are determined, those heirs or devisees have authority to negotiate a lease of the property, notwithstanding prior negotiations by the Superintendent in accordance with 25 CFR 162.2.

Joe P. Sievers v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 291 (Oct. 11, 1985)

Violation/BreachGenerally

Where the terms of a lease of Indian trust land set forth specific revocation or cancellation procedures, such terms are binding on the parties and on the Bureau of Indian Affairs in its capacity as trustee.

Patrick Patencio et al. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 92 (Apr. 4, 1986)

INDIANS--ContinuedLEASES AND PERMITS--ContinuedViolation/Breach--ContinuedGenerally--Continued

Under the circumstances of this case, the lessee of Indian trust or restricted property breached the lease by failing to attempt in good faith to complete development of the leased premises.

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)

Waiver of Breach

Whether the acceptance of rent by an Indian lessor after a default in specific provisions of a lease constitutes a waiver of the default is a question of the lessor's intent, which is determined on the basis of the facts of the particular case.

Jack Dean Franks v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 231 (Aug. 23, 1985)

Earle C. Strebe v. Deputy Ass't Secretary--Indian Affairs (Operations), 16 IBIA 62 (Mar. 21, 1988)

MINERAL RESOURCESOil and GasGenerally

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

INDIANS--ContinuedMINERAL RESOURCES--ContinuedOil and Gas--ContinuedGenerally--Continued

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986) 93 I.D. 159

Where the evidence establishes that a well drilled under an allotted Indian lands lease is no longer capable of producing oil or gas in paying quantities, and an opportunity has been afforded to the Indian lessor to obtain another operator but attempts to obtain one have been unsuccessful, a decision by BLM permitting the original operator to plug and abandon the well will be affirmed.

Everett Hall, 101 IBLA 362 (Mar. 28, 1988)



INDIANS--ContinuedNONRESTRICTED PROPERTY

Because of the Klamath Termination Act, the Bureau of Indian Affairs has no authority to hold land in Indian trust status for members of the Klamath Tribe.

Gloria Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations) & Jeanette Fay Quiver v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 344 (Dec. 27, 1985)  
92 I.D. 628

OSAGE HEADRIGHTS

Income accruing from an Osage Indian headright is properly paid to the owner or owners of the headright on the segregation date.

Estate of Vivian M. Rogers v. Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs, 14 IBIA 217 (Aug. 8, 1986)

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

Ernestine M. Smith et al v. Area Director, Muskogee Area Office, Bureau of Indian Affairs, 16 IBIA 153 (June 21, 1988)

The Department of the Interior can take appropriate action concerning the approval or disapproval of an Osage will after the entry of the Oklahoma district court's decision.

INDIANS--ContinuedOSAGE HEADRIGHTS--Continued

The Department of the Interior has authority to reopen an Osage probate upon a showing that the approval of a will was given under a mistake of fact.

Robert M. Maurer v. Muskogee Area Director, Bureau of Indian Affairs, 17 IBIA 129 (May 17, 1989)

RESERVATIONSGenerally

Determination of the use of its own land is peculiarly the province of an Indian tribe.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

Boundaries

For the purposes of tribal acquisition of land in trust status, 25 CFR 151.2(f) provides that in Oklahoma "Indian reservation" means that area of land constituting the former reservation of the tribe.

Thlopthlocco Tribal Town v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 302 (Oct. 25, 1985)

ROADS

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to

INDIANS--ContinuedROADS--Continued

the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 17 IBIA 78 (Feb. 22, 1989)

SOCIAL SERVICES

Regulations in 25 CFR 20.13 provide that, following a request for covered financial assistance, an applicant may either request a hearing within 20 days or file an appeal within 30 days. If an unfavorable decision is rendered after a hearing, an appeal may still be filed.

Sylvester & Shirley LaRocque v. Aberdeen Area Director, Bureau of Indian Affairs, 18 IBIA 80 (Dec. 19, 1989)

TAXATION

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

A tax ordinance passed by an Indian tribe does not unduly burden interstate commerce if it applies to an activity with a substantial nexus with the tribe, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the tribe.

A taxpayer claiming immunity from an Indian tribal tax has the burden of proving entitlement to an exemption.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

INDIANS--ContinuedTIMBER RESOURCESGenerally

A Bureau of Indian Affairs appraisal of tribal timber resources conducted for the purpose of evaluating proposed stumpage rates will not be overturned unless it is shown to be unreasonable.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

Timber\_Sales\_ContractsGenerally

Appellant did not establish that the rejection of his bid on a timber sales contract involved a conflict of interest on the part of a Bureau of Indian Affairs employee, but the allegation warrants discussion in the decision on remand.

The regulations governing timber sales from tribal land authorize rejection of a high bid if the high bidder is considered unqualified to perform the contract or if there are reasonable grounds to consider it in the interest of the Indians to reject the high bid. 25 CFR 163.11(a).

The determination of whether a high bidder is qualified to perform a timber sales contract or whether rejection of a high bid is in the interest of the Indians is a determination requiring the exercise of discretion.

Earl Vielle v. Area Director, Billings Area Office, Bureau of Indian Affairs, 15 IBIA 40 (Oct. 30, 1986)

The determination whether to approve stumpage rates under a timber sale contract between a tribe and its tribal forest enterprise is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of

INDIANS--ContinuedTIMBER RESOURCES--ContinuedTimber\_Sales\_Contracts--ContinuedGenerally--Continued

the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

25 CFR 163.6(c) requires that stumpage rates for tribal timber sold to Indian tribal forest enterprises be authorized by the Secretary of the Interior.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

TRADERS

Except in cases of willfulness or where public health, interest or safety required otherwise, 5 U.S.C. § 558(c) (1982), dictates that, prior to institution of proceedings to revoke an Indian trader's license, the licensee must be given written notice of the facts or conduct that may warrant revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements.

For purposes of the procedural requirements concerning license revocation in 5 U.S.C. § 558(c) (1982), a finding that a licensed Indian trader acted willfully requires evidence that he acted intentionally or with careless disregard of agency requirements.

Elias H. Attea, Jr. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 16 IBIA 138 (June 6, 1988)

INDIANS--ContinuedTRIBAL GOVERNMENTGenerally

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter to the attention of appropriate tribal officials.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes to resolve their own internal disputes.

Ellen Wright v. Aberdeen Area Director, Bureau of Indian Affairs, 17 IBIA 296 (Sept. 21, 1989)

Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs has authority to interpret tribal law in order to determine the tribe's legitimate governing body.

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

An ambiguous notice provision in an ordinance concerning the removal of tribal officials from office should be interpreted to require that reasonable



INDIANS--ContinuedTRIBAL GOVERNMENT--ContinuedConstitutions, Bylaws, and Ordinances--Continued

notice be provided to the official whose removal is sought.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

The Board of Indian Appeals and the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws.

The Board of Indian Appeals has authority to interpret tribal law in order to review decisions made by the Bureau of Indian Affairs.

Menominee Tribal Enterprises v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 263 (Aug. 12, 1987)

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

The Board of Indian Appeals undertakes to interpret tribal law only where there is a clear necessity for it to do so.

Herschel Sahmaunt et al. v. Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 60 (Jan. 30, 1989)

INDIANS--ContinuedTRIBAL GOVERNMENT--ContinuedConstitutions, Bylaws, and Ordinances--Continued

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibility under Federal law for ensuring the proper performance of the tribe's judgment fund distribution plan requires it to make an independent judgment concerning whether the tribal membership has approved a proposal for expenditure of the funds.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

The Department of the Interior has authority to interpret a tribal constitution with respect to the Secretary's ordinance approval role under the constitution.

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1982), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Under Article IV of its constitution, the Minnesota Chippewa Tribe has authority to establish a tribal appellate forum to supervise the actions of an Election Judge in order to determine whether the Judge has acted

INDIANS--ContinuedTRIBAL GOVERNMENT--ContinuedConstitutions, Bylaws, and Ordinances--Continued

within the scope of the authority delegated under the tribal election ordinance.

Walter F. Reese, Anishinabe Akeeng, Inc., & the Enrolled Members for Constitutional Rights v. Minneapolis Area Director, Bureau of Indian Affairs, 17 IBIA 169 (July 6, 1989)

While the Bureau of Indian Affairs should give deference to a tribe's interpretation of its own laws, its responsibilities under Federal and tribal law may require it to make an independent determination concerning whether certain tribal actions were taken in accordance with tribal law.

Under Article IV, sec. 1, of the Constitution of the Rumsey Indian Rancheria, the governing body of the tribe is the Community Council, which is "composed of all qualified voters of the band who are 18 years of age or older."

Elaine Frease & Bessey Villalobos v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 241 (Aug. 24, 1989)

Elections

Petitions for Secretarial action filed under 25 CFR Part 82 are limited to requests for the Secretary to call elections to amend tribal constitutions, to issue charters pursuant to a Federal statute, and for other purposes where constitutions and charters provide for petitioning to effect action by the Secretary.

An election called by the Secretary pursuant to 25 CFR Part 81 is not appropriate for the purposes of temporarily suspending a tribal constitution and recalling and replacing tribal officials.

Pueblo of Zuni Concerned Community Citizens Committee v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 30 (Feb. 12, 1986)

INDIANS--ContinuedTRIBAL GOVERNMENT--ContinuedElections--Continued

When a tribal governing body legislates to disenfranchise members who fall within a class of voters described in the tribal constitution, the legislation must be carefully scrutinized for validity.

In certain narrow circumstances, tribal legislation which disenfranchises members who fall within a class of voters described in the tribal constitution may be upheld.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 181 (July 24, 1986)

Where an Indian tribe's judgment fund distribution plan requires that the funds be expended only as approved by the tribal membership, the Bureau of Indian Affairs, as trustee for the funds, has the authority to decline to recognize the results of a tribal mail survey conducted for the purpose of approving expenditure of the funds, upon reasonably concluding that the results do not represent the informed views of the tribal membership.

Prairie Band of Potawatomi Indians v. Acting Area Director, Anadarko Area Office, Bureau of Indian Affairs, 17 IBIA 97 (Mar. 28, 1989)

Judicial System

The extent of a tribal court's jurisdiction should be raised first to the court, rather than being addressed through collateral attack before the Bureau of Indian Affairs.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

INDIANS--ContinuedTRIBAL GOVERNMENT--ContinuedOfficers

An ambiguous notice provision in an ordinance concerning the removal of tribal officials from office should be interpreted to require that reasonable notice be provided to the official whose removal is sought.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 105 (Feb. 12, 1987)

A tribal official who received adequate notice of tribal proceedings to remove him/her from office but who failed to exhaust tribal remedies may not challenge the tribal proceedings in a Department of the Interior forum.

Susan Totenhagen v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 9 (Nov. 19, 1987)

TRIBAL POWERSGenerally

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

The Board of Indian Appeals is not the proper forum in which to challenge an Indian tribe's interpretation of its own tribal resolutions.

Oliver Redfield v. Area Director, Billings Area Office, Bureau of Indian Affairs, 13 IBIA 356 (Dec. 27, 1985)

INDIANS--ContinuedTRIBAL POWERS--ContinuedGenerally--Continued

The Board of Indian Appeals has jurisdiction over decisions issued by Bureau of Indian Affairs officials under Chapter I of 25 CFR. It does not have jurisdiction over decisions made by duly constituted tribal officials or governing bodies.

Vance Gillette, Margaret S. Wilson, & Frank Talker v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 14 IBIA 71 (Feb. 26, 1986)

Alta Kane Rogers v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 15 IBIA 13 (Oct. 16, 1986)

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter to the attention of appropriate tribal officials.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

Self-Determination

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409



INDIANS--Continued

## TRIBAL POWERS--Continued

Self-Determination--Continued

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

Tribal Sovereignty

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Constitutional proscriptions, such as those contained in the Fifth and Fourteenth Amendments to the United States Constitution, that limit the exercise of Federal and state governmental powers, are not applicable to Indian tribes except to the extent they are explicitly endorsed by a tribal constitution or imposed by Congress.

The Board of Indian Appeals is not the proper forum in which to challenge a tribal ordinance as being violative of the guarantee of equal protection of the laws as provided in the Indian Civil Rights Act.

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBIA 46 (Feb. 25, 1986) 93 I.D. 79

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve

INDIANS--Continued

## TRIBAL POWERS--Continued

Tribal Sovereignty--Continued

their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

One of the most fundamental concepts of Indian law is that Indian tribes are dependent sovereign nations that retain full powers of internal self-government except to the extent that those powers have been limited by treaty or express Federal congressional action. The corollary of this proposition is that, acting alone, states lack the power to limit the sovereignty of an Indian tribe.

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Anna Thompson et al. v. Area Director, Eastern Area Office, Bureau of Indian Affairs, 17 IBIA 39 (Jan. 23, 1989)

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

Walter F. Reese, Anishinabe Akeeng, Inc., & the Enrolled Members for Constitutional Rights v. Minneapolis Area Director, Bureau of Indian Affairs, 17 IBIA 169 (July 6, 1989)

INDIANS--ContinuedTRUST RESPONSIBILITY

In order to fulfill its trust responsibility, the Bureau of Indian Affairs must carry out actions undertaken on behalf of Indian beneficiaries in a way that is not contrary to their best interests.

Patricia Ann Schoolcraft Patencio v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 150 (May 21, 1985)

There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

White Mountain Apache Tribe dba Fort Apache Timber Co. v. Deputy Ass't Secretary--Indian Affairs (Operations), 17 IBIA 258 (Aug. 25, 1989)

In determining whether to approve the sale of a minor Indian's trust land to another Indian, the Bureau of Indian Affairs' trust duty is solely to the minor for whom the land is held in trust.

Perian Smith, Conservator for Andria Dian Smith (Minor) v. Acting Billings Area Director, Bureau of Indian Affairs, 18 IBIA 36 (Oct. 26, 1989)

WATER AND POWER RESOURCESIrrigation Projects

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

INDIANS--ContinuedWATER AND POWER RESOURCES--ContinuedOperation and Maintenance

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

INTERVENTION

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBIA 77 (Feb. 14, 1985)  
92 I.D. 83

An intervenor or joined party cannot maintain a case when the original case or parties are dismissed unless he/she is independently properly before the Board of Indian Appeals.

Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (July 9, 1987)

A person with no legal status in an appeal will not be heard to object to a settlement agreement reached between the parties.

San Juan County, Washington v. Portland Area Director, Bureau of Indian Affairs, 18 IBIA 12 (Oct. 5, 1989)

LACHES

The United States is not barred by the equitable defenses of estoppel and laches from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

The constitutional right to a speedy trial applies only to criminal proceedings; the authority of the United States to enforce a public right or protect a public interest is not lost by delay of its officers in the performance of their duties, especially where respondent's actions contrIBUTE to such delay and respondent is not prejudiced thereby.

Paul Asper v. U.S. Fish & Wildlife Service, 6 OHA 86 (Nov. 8, 1985)

The Department does not have an affirmative duty to immediately adjudicate a mining claimant's recordation filings made pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

LACHES--Continued

A grazing licensee's right to request an adjustment of grazing privileges under a range-line agreement will not be barred by laches if the facts show that there has been no lack of diligence in asserting the claim.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

The Department does not have an affirmative duty to immediately adjudicate mineral recordation filings.

Joseph L. Frankmore, 101 IBLA 202 (Feb. 22, 1988)

Even though the elements necessary for invoking estoppel against the United States may be present, estoppel will not lie if to do so would interfere with underlying Government policies or unduly undermine the enforcement of a particular law or regulation. An approval of an assignment of grazing rights within the Capitol Reef National Park to a party not an heir of the holder of those rights on Dec. 18, 1971, contrary to the express provisions of 16 U.S.C. § 273b (1982), may be rescinded after a lapse of 9 years, as the Bureau of Land Management had no authority to approve such assignment, and to do so would be directly contrary to the intent of Congress when establishing the park.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)



## LACHES--Continued

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by laches, neglect of duty, failure to act, or delays in the performance of duties.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

## LIEU SELECTIONS

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

An application for a recordable disclaimer of the Government's interest in a parcel of land in the Los Padres National Forest (formerly, Pine Mountain and Zaca Lake Forest Reserve) pursuant to sec. 315 of the Federal Land Policy and Management Act of 1976, which parcel was deeded to the Government in 1901 in contemplation of selecting another parcel in lieu thereof pursuant to the Act of June 4, 1897, is properly rejected even though the lieu selection was never consummated, because the Act of July 6, 1960, quieted title to such land in the United States as part of the national forest in which the lands are located.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

## MATERIALS ACT

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

A determination to not waive a breach of contract for sales of mineral materials will not be overturned absent a showing that the determination is arbitrary, capricious, or not in the best interest of the Federal Government.

T. Brown Constructors, Inc., 98 IBLA 1 (May 28, 1987)

MATERIALS ACT--Continued

When an application for a mineral material sale is received which covers land embraced in an unpatented mining claim, which claim is not manifestly invalid for a reason appearing of record, BLM should first make a preliminary determination whether it believes that a basis exists for concluding that the claim is invalid and, if such a determination is in the affirmative, BLM should then decide whether the benefits to be obtained by a successful challenge to the mining claim outweigh the administrative costs in pursuing a mining claim contest.

Roger B. Woody, 112 IBLA 51 (Nov. 20, 1989)

MIGRATORY BIRD CONSERVATION ACT

(See also Wildlife Refuges & Projects--if included in this Index.)

## GENERALLY

The mere award of a timber contract by the Bureau of Land Management does not violate the Migratory Bird Treaty Act.

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

MILLSITES

(See also Mining Claims--if included in this Index.)

## GENERALLY

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

MILLSITES--Continued

## GENERALLY--Continued

The failure of a holder of a millsite claim which has been properly recorded under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), to file an annual notice of intention to hold the millsite is a curable defect. Where the Bureau of Land Management fails to notify a millsite claimant of a defective filing, and to request curative data prior to the time annual notices are submitted in subsequent years, BLM has effectively waived the defective filing and may not declare the millsite claim abandoned and void because of the absence of that document from the file.

James J. Kohring, 89 IBLA 345 (Nov. 14, 1985)

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use

MILLSITES--ContinuedGENERALLY--Continued

the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Elmer H. Swanson, Livingston Silver Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

MILLSITES--ContinuedGENERALLY--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim, because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)



MILLSITES--Continued

## GENERALLY--Continued

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite abandoned and void without first according the claimant an opportunity to comply with the notice of deficiency. Where, owing to misdelivery of BLM's decision providing such opportunity and BLM's misstatement of applicable appeal procedures, claimant may not have been aware of such opportunity, the claimant may be provided with an additional opportunity on remand.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel,  
107 IBLA 47 (Jan. 27, 1989)

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

## DEPENDENT

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

United States v. Elmer H. Swanson, Livingston Silver,  
Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

MILLSITES--Continued

## DETERMINATION OF VALIDITY

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Elmer H. Swanson, Livingston Silver,  
Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA  
68 (July 15, 1986)

MILLSITES--ContinuedDETERMINATION OF VALIDITY--Continued

Where a millsite claim is located in conjunction with placer mining claims, an applicant for mineral patent must show the millsite claim is located on non-mineral land and is used or occupied for mining operations. 30 U.S.C. § 42(b) (1982).

Pine Valley Builders, Inc., 103 IBLA 384 (Aug. 15, 1988)

MINERAL LANDS

(See also Mining Claims--if included in this Index.)

GENERALLY

Where the subsurface mineral estate is severed from the surface estate, the owner of the mineral estate retains, either by the express terms of the conveyance or as a necessary implication therefrom, a right of entry or access to the minerals over or through the surface, absent an expressed intent to the contrary in the document creating the severance. Since no such contrary intent was manifested in the Alaska Native Claims Settlement Act, insofar as lands in Naval Petroleum Reserve No. 4, now NPR-A, are concerned, the Department of the Interior, as the present owner of the mineral estate, is vested with such right of entry or access independent of any contractual grant of access rights.

Kuupik Corp., 85 IBLA 366 (Mar. 26, 1985)

To the extent a state has lost minerals lands or lands containing its own geologic structure of a producing oil or gas field, the state may select other lands in the same category, provided the selected lands are not already subject to a producing or producible mineral lease or permit.

With respect to oil lands, the term "producibile" refers to leased land on which there is a well capable of production, but on which production has been suspended.

California Elk Hills Indemnity Selections, M-36950 (Dec. 18, 1984) 92 I.D. 515

MINERAL LANDS--ContinuedGENERALLY--Continued

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

LEASES

An application for a preference right lease made in 1986 was required to include the information specified under 43 CFR 3521.1-1 (1985). An application which was not in conformance with the requirements of 43 CFR 3521.1-1 (1985), was properly rejected.

James Peters, 105 IBLA 147 (Oct. 27, 1988)

MINERAL RESERVATION

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

Hulda Boutsen, 90 IBLA 310 (Feb. 24, 1986)

MINERAL LANDS--ContinuedMINERAL RESERVATION--Continued

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986)  
93 I.D. 179

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

George W. Hammer et al., 95 IBLA 105 (Dec. 31, 1986)

MINERAL LANDS--ContinuedMINERAL RESERVATION--Continued

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987)  
94 I.D. 1

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)



MINERAL LANDS--ContinuedMINERAL RESERVATION--Continued

Adjudication of a mineral claimant's bond pursuant to 43 U.S.C. § 299 (1982), does not require a formal hearing on the record in conformity to provisions of the Administrative Procedure Act, 5 U.S.C. § 557 (1982). The landowner's rights to notice and an opportunity to be heard concerning the adequacy of the bond furnished to protect his rights as a property owner are safeguarded by the right of appeal to this Board.

A mineral claimant's bond given to enable mining on land patented under the Stock-Raising Homestead Act must be executed by all mineral claimants seeking to re-enter the patented lands.

A mineral claimant's bond must identify the claims sought to be entered by a mineral claimant seeking to re-enter SHRA lands, so as to permit BLM to determine possible damages to crops, surface improvements, and the grazing value of the land within those claims.

Brock Livestock Co., Inc., 101 IBLA 91 (Feb. 2, 1988)

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the mineral claimant's proposed activities on the patented lands.

William & Pearl Hayes, 101 IBLA 110 (Feb. 2, 1988)

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

MINERAL LANDS--ContinuedMINERAL RESERVATION--Continued

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

NONMINERAL ENTRIES

Prior to passage of sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of 1980, 43 U.S.C. § 1634(a)(3) (1982), lands containing valuable deposits of gravel were considered to be mineral lands unavailable for Native allotment.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

PROSPECTING PERMITS

The Department of the Interior has no authority to issue a prospecting permit for hardrock minerals on acquired lands subject to sec. 402, Reorganization Plan No. 3 of 1946 (60 Stat. 1099), without the consent of the Forest Service, U.S. Department of Agriculture.

Energy Reserves Group, Inc., 89 IBLA 233 (Oct. 29, 1985)

MINERAL LANDS--ContinuedPROSPECTING PERMITS--Continued

If all the requirements for issuance of a prospecting permit, including those requirements found at 43 CFR Subpart 3568 are met, it is proper for BLM to issue a prospecting permit for lands within the Whiskeytown-Shasta-Trinity National Recreation Area.

Nevcan Exploration, Inc., 91 IBLA 55 (Feb. 28, 1986)

In June 1981 a 2-year extension of a prospecting permit properly ran from the date of expiration of the primary term of the permit and a BLM decision purporting to extend the term beyond that 2-year period was improper. Thus, when a prospecting permit applicant filed an application for certain lands covered by the extension shortly after the expiration of the 2-year period, the land was available and that applicant established priority such that a subsequent application was properly rejected by BLM.

Crown Resource Corp., 91 IBLA 180 (Mar. 28, 1986)

A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date.

Steve Dwyer, 93 IBLA 283 (Aug. 29, 1986)

A holder of a prospecting permit who seeks an extension of the permit must justify the request for more time to prospect. Where the information provided by the permittee to support extension fails to show either that reasonably diligent exploration efforts have been made or that the failure to perform exploration work was the result of circumstances beyond the control of the permittee, the extension request is properly denied.

A. J. Maurer, Jr., et al., 101 IBLA 276 (Mar. 14, 1988)

MINERAL LANDS--ContinuedPROSPECTING PERMITS--Continued

The requirement in a hard-rock prospecting permit that the permittee provide notice to and receive approval from the Forest Service before commencing any exploration activity is separate from and in addition to the provision in the permit requiring submittal of an exploration plan to BLM before commencing such activities. Compliance with the Forest Service reporting provision does not constitute compliance with the BLM provisions.

The rights of a holder of a prospecting permit are conditioned upon compliance with the requirements imposed by regulation and the permit itself. BLM may properly reject a preference right lease application filed pursuant to the prospecting permit on the basis that the exploration information submitted to support a discovery of a valuable mineral was not obtained under an approved exploration plan as required by regulation and permit provisions.

Lucky II Mines, 102 IBLA 55 (Apr. 14, 1988)

An application for a preference right lease made in 1986 was required to include the information specified under 43 CFR 3521.1-1 (1985). An application which was not in conformance with the requirements of 43 CFR 3521.1-1 (1985), was properly rejected.

James Peters, 105 IBLA 147 (Oct. 27, 1988)

The Department of the Interior has no authority to issue permits or leases for the exploration or mining of hardrock minerals in land acquired by and held under the jurisdiction of the Department of the Army.

Thomas R. Frazier, Jonathan M. Brown, 106 IBLA 43 (Dec. 8, 1988)

## MINERAL LANDS--Continued

### PROSPECTING PERMITS--Continued

The filing of a bentonite prospecting permit application creates no vested rights in the applicant. If the land described in the application is determined to be within a known bentonite leasing area, it is subject to the competitive leasing provisions of 30 CFR Subpart 3564, and the application must be rejected. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying bentonite bed.

A. J. Maurer, Jr., 106 IBLA 308 (Jan. 6, 1989)

## MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits--if included in this Index.)

### GENERALLY

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

There are several lawful ways to define the statutory phrase "producing . . . in commercial quantities," contained in sec. 2(a)(2)(A) of the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A). The Secretary has discretionary authority to administratively define the phrase.

The prohibition against the issuance of new leases created by sec. 2(a)(2)(A) of the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A), extends to all mineral leases

## MINERAL LEASING ACT--Continued

### GENERALLY--Continued

issued under the Mineral Leasing Act, not merely to coal leases.

If a coal lease issued prior to Aug. 4, 1976 is not producing but is in compliance with its lease diligence obligations, the sec. 2(a)(2)(A) leasing prohibition will nonetheless attach to the holder of the nonproducing coal lease.

The sec. 2(a)(2)(A) leasing prohibition does not arise when advance royalties are being paid in lieu of production under sec. 7(b) of the Mineral Leasing Act, 30 U.S.C. § 207(b), continued operation obligation, and when production is not occurring because of force majeure.

Production during the 10-year holding period does not toll the running of the 10-year holding period of sec. 2(a)(2)(A).

The sec. 2(a)(2)(A) leasing prohibition does not attach to the holder of a coal lease that is not producing because production has been suspended under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

The sec. 2(a)(2)(A) leasing prohibition does not attach to the holder of a nonproducing coal lease that is included in a producing logical mining unit approved under sec. 2(d) of the Mineral Leasing Act, 30 U.S.C. § 202a.

Upon approval of a coal lease assignment, a new 10-year holding period starts for the assignee, and the assignor of the nonproducing coal lease is no longer penalized by the lease's nonproducing status.

Sec. 2(a)(2)(A) does not prohibit an entity which is disqualified from lease issuance from acquiring a lease by assignment.

Under sec. 30 of the Mineral Leasing Act, 30 U.S.C. § 187, the Secretary has discretionary authority to prohibit coal lease assignments holding nonproducing leases for 10 years more.

The Secretary lacks authority to disapprove a relinquishment of a nonproducing coal lease for the



MINERAL LEASING ACT--ContinuedGENERALLY--Continued

sole reason the lessee has not produced coal in 10 years or more.

The sec. 2(a)(2)(A) leasing prohibition runs to all entities "controlled by or under common control" with the holder of a nonproducing lease.

Sec. 2(a)(2)(A) of the Mineral Leasing Act of 1920, 537 M-36951 (Feb. 12, 1985), 92 I.D. 537

Pursuant to 30 U.S.C. § 207(a) (1982) and 43 CFR Subpart 3451, the Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms.

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Consolidation Coal Co., Chevron Coal Development Co., 86 IBLA 60 (Apr. 10, 1985)

The Bureau of Land Management may properly conform a competitive coal lease to set forth the specific deferred bonus bid and schedule for payment in accordance with the terms of the lease sale. By submitting its bid, the lessee has already agreed to such a deferred bonus bid payment where the term was included in the detailed statement of the lease sale and was

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

incorporated into the contract upon acceptance of the bid and subsequent lease issuance.

Bureau of Land Management may not cancel a competitive coal lease by administrative action, but must institute an appropriate judicial proceeding under 30 U.S.C. § 188(a) (1982) where, subsequent to lease issuance, the lessee failed to pay timely an installment of the deferred bonus bid, and the annual rental as required by the lease which failure constituted cause for cancellation.

Apex Mining Co., Inc., Jerry W. Williams, 86 IBLA 242 (Apr. 30, 1985)

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985), 92 I.D. 293

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

Kaiser Steel Corp., 87 IBLA 228 (June 19, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravell an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

When Congress speaks on a specific matter in the administration of Federal mineral leasing, it thereby defines the public interest and accordingly limits the Secretary's discretion with respect to that matter. A lease stipulation purporting to require a lessee to

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

waive the right of assignment is inconsistent with sec. 30a of the Mineral Leasing Act.

Clarification of Secretarial Authority to Restrict the Size of Oil & Gas Lease Assignments, M-36778 (Supp.) (Aug. 13, 1984) 92 I.D. 121

Where a notice of intent to readjust a coal lease is given to a lessee prior to expiration of the period allowed for readjustment, such notice satisfies the statutory requirements, and the Bureau of Land Management may subsequently provide the specific terms or conditions for readjustment.

The Secretary is vested with broad discretionary authority to readjust every term or condition of a coal lease. A lessee of a pre-Federal Coal Leasing Amendments Act lease has no vested rights to the indefinite continuation of existing lease terms. Terms and conditions which are mandated by statute and regulation or are necessary for proper administration of public lands must be included in a readjusted lease.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to the Act.

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

Gulf Oil Corp., The Pittsburgh & Midway Coal Mining Co., 91 IBLA 93 (Mar. 13, 1986)

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2-percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982), if needed.

Spring Creek Coal Co., 94 IBLA 333 (Nov. 25, 1986)

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

Pacificorp., 95 IBLA 16 (Dec. 12, 1986)

When BLM gives a notice of intent to readjust a coal lease to the lessee prior to the 20-year lease anniversary date, the notice satisfies the statutory requirement for timely readjustment and BLM may, within the time provided in 43 CFR 3451.1, subsequently provide the specific terms and conditions for readjustment.

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions that the Department may impose upon readjustment of leases issued prior to that Act. All terms and conditions of the lease are subject to readjustment.

BLM's decision to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands.

In accordance with 30 U.S.C. § 207(a) (1982), the Secretary has determined by regulation that the royalty for coal mined will be not less than 12-1/2 percent of the value of coal removed from a surface mine and not less than 8 percent of the value of coal removed from an underground mine. However, the authorized officer may determine a lesser amount is appropriate for an underground mine, but in no case less than 5 percent. In addition, the Secretary may, in accordance with 43 CFR 3473.3-2(d), reduce the royalty obligation.

Coastal States Energy Co. et al., 94 IBLA 352 (Dec. 1, 1986)

A BLM decision to designate an area as a known phosphate leasing area which did not give consideration to intrinsic economic factors is invalid, and cannot serve as a proper basis to reject a phosphate prospecting permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982). Where BLM, in adjudicating a phosphate prospecting permit application, determines the workability of phosphate deposits in an area based on limited considerations of whether mining was

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

technically feasible, the decision will be set aside and the case remanded to BLM for further adjudication.

Where the existence and workability of phosphate in an area is not known, the Secretary is authorized pursuant to 30 U.S.C. § 211(b) (1982), to issue prospecting permits. However, the Secretary has discretionary authority not to issue a permit where a determination has been made in the first instance that phosphate development would not be in the national interest.

Elizabeth B. Archer et al., 102 IBLA 308 (May 31, 1988)

"Term." The term of a lease issued pursuant to the Mineral Leasing Act, when used without limitation as in sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, includes all periods of time between the effective date and the expiration date and means the entire estate demised by the lease.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

The Federal Coal Leasing Amendments Act, 30 U.S.C. §§ 201-209 (1982), governs the terms and conditions the Department may impose upon readjustment of leases issued prior to the Act.

When a coal lessee conducting underground coal operations objects to a provision in a readjusted coal lease establishing a royalty of 8 percent for coal removed by underground methods and argues that conditions warrant the imposition of a royalty rate of 5 percent, the case will be remanded to BLM to allow the lessee the opportunity to establish that conditions warrant a royalty rate of less than 8 percent.

A BLM decision to increase the amount of bonding required for a coal lessee will be affirmed when the increase is consistent with regulatory purposes.

Utah Power & Light Co., 104 IBLA 284 (Sept. 14, 1988)



MINERAL LEASING ACT--ContinuedGENERALLY--Continued

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. § 201(a)(2)(A) (1982), insofar as the lessee seeks to qualify to hold other Federal leases.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)  
96 I.D. 77

Under 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), 10 years from which they held a Federal coal lease for 10 deposits in commercial quantities, in the absence of extraordinary circumstances concerning the failure to produce coal on this lease, BLM is prohibited from approving an assignment transferring an interest in any existing Federal coal lease to them. Under 43 CFR 3472.1-2(e)(1)(ii), an entity seeking to obtain approval of a transfer must qualify on the date the transfer is disapproved. Where the parties did not qualify for

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

the assignment at the time BLM considered their application for approval of assignment, BLM properly disapproves the application.

The requirement that a coal lease be "diligently developed" on pain of termination is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits "in commercial quantities." It is irrelevant to the application of 43 CFR 3472.1-2(e)(1)(i) when and whether the holders of a lease not producing coal deposits in commercial quantities might also be required to accomplish "diligent development" of that lease.

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

BLM properly increases the bond for a coal lease in accordance with appropriate Departmental guidelines where the lease goes from a nonproducing to a producing status, regardless of whether such production constitutes full development of the leased land.

United States Fuel Co., 109 IBLA 398 (June 27, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

If the record contains conflicting BLM calculations of recoverable coal reserves existing on the lease at the time the lease became subject to the due diligence requirement, and BLM has failed to explain its decision to use an earlier, higher estimate of recoverable reserves rather than a subsequent, lower estimate for calculating the production rate necessary to satisfy the continued operation requirement, BLM's calculations will be set aside, and the case will be remanded for further consideration of the recoverable coal reserves estimate.

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adopted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

Where BLM prepares a Technical Mineral Report for purposes of evaluation based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of

MINERAL LEASING ACT--ContinuedGENERALLY--Continued

opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

ENVIRONMENT

Issuance of mineral leases within the Flamingo Gorge National Recreation Area require the consent of the Secretary of the Interior based on a finding that such disposition "would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460v-4 (1982). Where an issue of fact is raised by the record concerning the potential impact of subsidence on the Colorado River basin, this issue may be referred for a hearing pursuant to 43 CFR 4.415.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

GILSONITE LEASES AND PERMITSGenerally

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act,

MINERAL LEASING ACT--ContinuedGILSONITE LEASES AND PERMITS--ContinuedGenerally--Continued

is reasonably adopted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

Applications

Where applications for prospecting permits filed prior to the effective date of authorizing regulations are not rejected by BLM, they may be cured by amendment, with priority established on the date amendments are filed. For the purpose of establishing priority, the amended applications are treated in the same manner as over-the-counter lease offers. If the filing of intervening applications prevents a determination of priority, the ambiguity should be remedied by simultaneous drawing.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

MINERAL LEASING ACT--ContinuedGILSONITE LEASES AND PERMITS--ContinuedWorkability

"Workability." Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. The fact that lands applied for adjoin other lands which contain known workable gilsonite deposits does not, alone, establish a geologic inference that the lands under application contain known workable deposits as well.

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

LANDS SUBJECT TO

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)



MINERAL LEASING ACT--Continued

## LANDS SUBJECT TO--Continued

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

Daniel C. Wychgram, 92 IBLA 18 (May 6, 1986)

Issuance of mineral leases within the Flaming Gorge National Recreation Area require the consent of the Secretary of the Interior based on a finding that such disposition "would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460v-4 (1982). Where an issue of fact is raised by the record concerning the potential impact of subsidence on the Colorado River basin, this issue may be referred for a hearing pursuant to 43 CFR 4.415.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

Lands designated by Congress as a component of the National Wilderness Preservation System pursuant to the provisions of the Wilderness Act of 1964, P.L. 88-577, 78 Stat. 890, 16 U.S.C. §§ 1131-1136 (1982), are withdrawn from disposition under the mineral leasing laws

MINERAL LEASING ACT--Continued

## LANDS SUBJECT TO--Continued

effective Jan. 1, 1984, subject to valid existing rights then existing.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

With limited exceptions, hardrock minerals such as gold and silver are not subject to leasing by the United States.

Kathryn J. Story, 104 IBLA 313 (Sept. 15, 1988)

Under the over-the-counter noncompetitive leasing system, no offer to lease public domain lands could include acquired lands. Where it was subsequently shown that acquired lands were leased pursuant to a lease offer for public domain lands, the lease is properly canceled as to the acquired lands.

Atlantic Richfield Co., 105 IBLA 61 (Oct. 17, 1988)

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for

MINERAL LEASING ACT--ContinuedLANDS SUBJECT TO--Continued

lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

RENTALS

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

MINERAL LEASING ACT--ContinuedROYALTIES

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

Mountain States Resources Corp., 92 IBLA 184 (June 12, 1986) 93 I.D. 239

Under 30 U.S.C. § 209 (1982), BLM is authorized to reduce the royalty for a coal lease below the minimum specified by statute whenever it is necessary to do so in order to promote development, or whenever the lease cannot be successfully operated under the terms provided therein.

The provisions of 30 U.S.C. § 209 (1982) specify no circumstance in which BLM is required to reduce the royalty of a coal lease. Under that statute, no entitlement to a reduction can ever arise. BLM remains free to accept the economic consequences of denying a reduction. The discretionary authority conferred by sec. 209 enables BLM to exercise prudent business judgment to select the alternative which best protects the economic interest of the United States as owner of the mineral resource.

The "bonus royalty" bid received in a competitive coal lease sale is properly considered a component of fair market value which the Secretary is required to obtain by terms of statute, 30 U.S.C. § 201(a)(1) (1982) and hence, there is no authority for reduction of that "bonus royalty" just as there is no authority for refund of a "cash bonus" from a lease sale. However, where protection of the interests of

MINERAL LEASING ACT--Continued

## ROYALTIES--Continued

the United States requires a reduction in royalty to ensure successful operation of a lease, 30 U.S.C. § 209 (1982) authorizes reduction of the statutory minimum component of the royalty.

When a coal lessee applies for a royalty reduction under 30 U.S.C. § 209 (1982), BLM cannot disregard the fact that the lessee's contracts with its customers provide for passing the royalty through to them. This fact is relevant to a determination of the necessity for royalty relief and must be considered if BLM is not to overstep the authority conferred by 30 U.S.C. § 209 (1982).

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)  
93 I.D. 394

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. An order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 215 (Nov. 5, 1986)

MINERAL LEASING ACT--Continued

## ROYALTIES--Continued

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation. Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)  
Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

When the mineral lease provides for such determination, the Minerals Management Service may properly determine to value zinc concentrates sold, for royalty purposes, on the basis of the highest price which the lessee would pay or receive pursuant to a contract with an unaffiliated supplier or buyer, if the contract under which the concentrates are actually sold is not a bona fide arm's-length transaction between independent parties.

AMAX Lead Co. of Missouri (On Reconsideration), 99 IBLA 313 (Oct. 29, 1987)

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)



MINERAL LEASING ACT--ContinuedROYALTIES--Continued

For royalty revenues from leases subject to 43 U.S.C. § 1337(g), the provisions of sec. 1337(g)(2) and (4) on investing and disbursing funds to coastal states supersede the provisions of 30 U.S.C. § 1721(b).

Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act, M-36956 (Jan. 14, 1988) 95 I.D. 203

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

Where the language of a negotiated coal lease provides that the value for royalty computation purposes shall be the price received by the lessee as adjusted for transportation and processing costs incurred between the point of delivery from the pit and the point of sale, and it is clear from the record that all transportation costs from the pit to the processing plant were intended to be deductible, the point of delivery from the pit is properly held to be the point when the haul trucks have been loaded in the pit.

Royalties, production and severance taxes, black lung taxes, and reclamation fees are properly considered to be elements of the costs of mining and, as such, no part of these expenses will be allowed to be deducted from value for royalty computation purposes as an indirect cost of transportation or processing.

Black Butte Coal Co., 103 IBLA 145 (July 21, 1988) 95 I.D. 89

MINERAL LEASING ACT--ContinuedROYALTIES--Continued

In accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), it is error for BLM, in readjusting a coal lease for an active underground coal mine, to set a royalty rate of 8 percent for coal removed from such mine without first determining if conditions warrant a lower rate.

Kaiser Coal Corp., 103 IBLA 312 (Aug. 5, 1988)  
Coastal States Energy Co., 105 IBLA 64 (Oct. 18, 1988)

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Estoppel will not lie against the Government to preclude collection of late payment charges where a coal lessee allegedly makes royalty payments based on the erroneous advice of a Government employee concerning the royalty rate, but the record shows that the lessee was not ignorant of the true facts concerning the effective date of a new royalty rate.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989) 96 I.D. 127

MINERAL LEASING ACT--ContinuedROYALTIES--Continued

The computation of an allowance for transportation and processing costs under the terms of a coal lease permitting the deduction of those costs from the value of the coal may be upheld as reasonable where it is based on the sum of the annual operating and maintenance expenses, the annual depreciation of transportation and processing equipment, and a return on undepreciated investment based on the prime interest rate.

Black Butte Coal Co., 111 IBLA 275 (Oct. 26, 1989)

The assessment of additional royalty due as a result of the improper deduction of a transportation allowance discovered during an audit may be affirmed where the improper deduction commenced prior to the period of the audit in the absence of evidence of a prior audit or adjudication of royalty due under the lease which dealt with the issue.

Forest Oil Corp., 111 IBLA 284 (Oct. 26, 1989)

MINERAL LEASING ACT FOR ACQUIRED LANDSGENERALLY

The requirement in a hard-rock prospecting permit that the permittee provide notice to and receive approval from the Forest Service before commencing any exploration activity is separate from and in addition to the provision in the permit requiring submittal of an exploration plan to BLM before commencing such activities. Compliance with the Forest Service reporting provision does not constitute compliance with the BLM provisions.

The rights of a holder of a prospecting permit are conditioned upon compliance with the requirements imposed by regulation and the permit itself. BLM may properly reject a preference right lease application filed pursuant to the prospecting permit on the basis that the exploration information submitted to support a discovery of a valuable mineral was not obtained

MINERAL LEASING ACT FOR ACQUIRED LANDS--ContinuedGENERALLY--Continued

under an approved exploration plan as required by regulation and permit provisions.

Lucky II Mines, 102 IBLA 55 (Apr. 14, 1988)

CONSENT OF AGENCY

The Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease offer be obtained prior to the issuance of a lease for such land. Where the Corps of Engineers does not consent to lease because its research testing could be affected by a drilling operation, the Department of the Interior is without authority to lease.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land.

Robert J. Shorney, 88 IBLA 61 (July 22, 1985)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

# MINERAL LEASING ACT FOR ACQUIRED LANDS--Continued

## CONSENT OF AGENCY--Continued

The requirement in a hard-rock prospecting permit that the permittee provide notice to and receive approval from the Forest Service before commencing any exploration activity is separate from and in addition to the provision in the permit requiring submittal of an exploration plan to BLM before commencing such activities. Compliance with the Forest Service reporting provision does not constitute compliance with the BLM provisions.

Lucky II Mines, 102 IBLA 55 (Apr. 14, 1988)

## LANDS SUBJECT TO

Where an offer to lease oil and gas on acquired lands describes land, part of which is within an incorporated city and part of which is outside the city, the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), precludes leasing of those lands within the city.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam O. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

# MINERAL LEASING ACT FOR ACQUIRED LANDS--Continued

## LANDS SUBJECT TO--Continued

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

Under the over-the-counter noncompetitive leasing system, no offer to lease public domain lands could include acquired lands. Where it was subsequently shown that acquired lands were leased pursuant to a lease offer for public domain lands, the lease is properly canceled as to the acquired lands.

Atlantic Richfield Co., 105 IBLA 61 (Oct. 17, 1988)

## MINERALS EXPLORATION

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

## MINERAL MANAGEMENT SERVICE

The Minerals Management Service correctly concluded that 30 CFR 202.150(a) precludes the deduction of line losses attributed to the transportation of royalty oil from the wellhead of an Outer Continental Shelf oil and gas lease to an onshore delivery point, as a transportation allowance.

Conoco, Inc., 103 IBLA 108 (July 19, 1988)



MINERAL MANAGEMENT SERVICE--Continued

An assessment of late payment charges by MMS cannot be affirmed if the administrative record submitted to the Board of Land Appeals by the Director, MMS, does not contain documents conclusively showing that the lessee failed to pay royalty timely. In the absence of the original payment vouchers duly date stamped to show when they were received (or other suitable proof), it cannot be found through the presumption of regularity that they were not timely filed.

When a notice of appeal to the Board of Land Appeals is filed from a decision of the Director, MMS, MMS is required to submit the complete, original casefile, containing all documents relating to the dispute at hand. Failure to include documents establishing relevant facts may prevent the Board from affirming the decision on appeal.

Dugan Production Corp., 103 IBLA 362 (Aug. 11, 1988)

GENERALLY

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989) 96 I.D. 127

The assessment of additional royalty due as a result of the improper deduction of a transportation allowance discovered during an audit may be affirmed where the improper deduction commenced prior to the period of the audit in the absence of evidence of a

MINERAL MANAGEMENT SERVICE--ContinuedGENERALLY--Continued

prior audit or adjudication of royalty due under the lease which dealt with the issue.

Forest Oil Corp., 111 IBLA 284 (Oct. 26, 1989)

APPEALS TO DIRECTORGenerally

In the absence of regulations specifically delineating how service of an invoice by MMS is effectuated, a payor engaged in a business relationship with MMS may specify a particular office or official to whom bills for collection should be directed. Service of an MMS bill for collection is not perfected until receipt by the official previously designated by the payor as the official to whom such notices should be directed.

Coastal Oil & Gas Corp., 106 IBLA 90 (Dec. 13, 1988)

MINING CLAIMS

(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act--if included in this Index.)

GENERALLY

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

MINING CLAIMS--ContinuedGENERALLY--Continued

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted, until the purchase price is paid, to uses reasonably incident to actual mining.

Nothing in the general mining laws invests a locator with the right to initiate occupancy on a

MINING CLAIMS--ContinuedGENERALLY--Continued

mining claim absent a showing that such occupancy is reasonably incident to mining activities.

Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985) 92 I.D. 208

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim

MINING CLAIMS--ContinuedGENERALLY--Continued

across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

There is no limit to the number of claims a person may locate.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

Where a lode mining claim is located partially on patented land or land in which the United States does not hold a mineral interest, such a claim is not properly held null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands onto which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Where a mining claim is located entirely on patented land or land in which the United States does not have a mineral interest, such claim is properly held to be null and void ab initio.

Nancy Lee Mines, Inc., 89 IBLA 257 (Oct. 31, 1985)

MINING CLAIMS--ContinuedGENERALLY--Continued

The failure of a holder of a millsite claim which has been properly recorded under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), to file an annual notice of intention to hold the millsite is a curable defect. Where the Bureau of Land Management fails to notify a millsite claimant of a defective filing, and to request curative data prior to the time annual notices are submitted in subsequent years, BLM has effectively waived the defective filing and may not declare the millsite claim abandoned and void because of the absence of that document from the file.

James J. Kohring, 89 IBLA 345 (Nov. 14, 1985)

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required prior to a decision holding that such claims are invalid.

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alamin Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

The primary purpose of the Mining Law of 1872, 30 U.S.C. § 22 et seq., is the disposal of mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)  
93 I.D. 369



MINING CLAIMS--ContinuedGENERALLY--Continued

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed where the record discloses appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyra-Vega II Mining Ass'n, 91 IBLA 378 (Apr. 28, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

MINING CLAIMS--ContinuedGENERALLY--Continued

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

A hearing will be ordered on a decision to disapprove a proposed mining plan of operations in a wilderness study area when there are significant factual or legal issues to be decided and the record without a hearing is insufficient to resolve them.

Norman G. Lavery, 96 IBLA 294 (Mar. 31, 1987)

Where a mining partnership fails to show that access to its mining claims will be affected by a BLM decision not to reserve a right of public access across lands conveyed to a Native corporation, the BLM decision will be affirmed.

Mespelt & Almasy Mining Co., 99 IBLA 25 (Aug. 26, 1987)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

MINING CLAIMS--ContinuedGENERALLY--Continued

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

MINING CLAIMS--ContinuedGENERALLY--Continued

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers

MINING CLAIMS--ContinuedGENERALLY--Continued

of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of

MINING CLAIMS--ContinuedGENERALLY--Continued

the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

Neither the assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

If any part of a lode mining claim is located on lands open to mineral entry, it cannot be deemed null and void ab initio because a portion of the claim is also on withdrawn lands.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

Nothing in the general mining laws invests individuals who reside on patented mineral land with a right of access across Federal land, when it appears from the record that the land is not subject to mineral exploration and development.

Bob Strickler et al., 106 IBLA 1 (Nov. 30, 1988)

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper



MINING CLAIMS--ContinuedGENERALLY--Continued

Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

ABANDONMENT

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

MINING CLAIMS--ContinuedABANDONMENT--Continued

Where a mining claimant apparently inadvertently omits the serial number of two claims from the affidavit of annual labor and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2.

Arley R. Taylor, 86 IBLA 283 (May 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

James Boatman, 87 IBLA 31 (May 22, 1985)

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

William J. Fairse, Glenn Fairse, 88 IBLA 22 (July 2, 1985)

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

Arla Newman, 88 IBLA 114 (July 31, 1985)

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Charles H. Hagerty, 87 IBLA 23 (May 21, 1985)

MINING CLAIMS--ContinuedABANDONMENT--Continued

Failure to file evidence of annual assessment work in calendar year 1981 for a mining claim located before Oct. 21, 1976, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2-1(a) (1981), constitutes abandonment of the claim and renders it void. Personal delivery of such evidence after regular business hours on Dec. 30, 1981, does not constitute compliance with the recordation requirement where the document is deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day, Dec. 31.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

The failure to timely file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office conclusively constitutes abandonment of the mining claim by the owner. This Board has no authority to excuse lack of compliance with the statute or to afford relief from the statutory consequences.

Forrest G. Niccum et al., 87 IBLA 129 (June 6, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Failure of a lessee or agent of the owner of an unpatented mining claim to make the filings required by 43 U.S.C. § 1744 (1982) provides no basis for reversal of a decision declaring the claim abandoned and void. Congress assigned the owner of the claim the responsibility of making the required filings; the owner must bear the consequence of filings not timely made.

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

MINING CLAIMS--ContinuedABANDONMENT--Continued

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2-1(b)(1), in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR Subpart 3833, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

Myron Cherry, 87 IBLA 165 (June 12, 1985)

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2, in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

There is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. When an appellant asserts the affidavit of annual assessment work was mailed to BLM, but lost, appellant must submit evidence that it was received by BLM in order to overcome this presumption.

Carmelita M. Holland, 87 IBLA 175 (June 13, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

MINING CLAIMS--ContinuedABANDONMENT--Continued

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

Gloria T. Bruce, C. Vince Bruce, 87 IBLA 338 (June 26, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1-2, the owner of an unpatented mining claim located on Federal land after Oct. 21, 1976, shall file a copy of the official record of the notice of location of the claim with the proper BLM office within 90 days after the date of location of the claim. This requirement is mandatory and failure to comply within the time period prescribed must be deemed conclusively to constitute an abandonment of the mining claim.

Mervil J. Cook, 87 IBLA 348 (June 26, 1985)

Pursuant to 43 CFR 3833.0-5(m), a proof of labor or notice of intention to hold will not be deemed as timely filed where it is mailed in an envelope bearing a clearly dated postmark affixed by the United States

MINING CLAIMS--ContinuedABANDONMENT--Continued

Postal Service prior to Dec. 31, within the period prescribed by law, but is not delivered to the proper BLM office by Jan. 19 immediately following.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

Failure to file an instrument required by 43 U.S.C. § 1744 (1982) within the prescribed time constitutes abandonment of the mining claim.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper office of the Bureau of Land Management within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Frank A. Putnam III, 88 IBLA 314 (Sept. 18, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

John D. O'Keefe (On Reconsideration), 88 IBLA 157 (Aug. 12, 1985)



MINING CLAIMS--ContinuedABANDONMENT--Continued

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of Title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744

MINING CLAIMS--ContinuedABANDONMENT--Continued

(1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

When a single claim has been recorded with BLM pursuant to 43 U.S.C. § 1744 (1982) on two or more occasions and given two or more mining recordation serial numbers, the proper corrective procedure is to merge the respective files and cancel one or more of the mining claim recordation serial numbers. If, on a combined basis, all requisite filings have been made, the claim should not be conclusively deemed to be abandoned pursuant to 43 U.S.C. § 1744(c) (1982).

Ralph C. Memmott, 88 IBLA 377 (Sept. 27, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

Failure to file affidavits of assessment work prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

Ptarmigan Co., Inc., 91 IBLA 113 (Mar. 17, 1986)

MINING CLAIMS--ContinuedABANDONMENT--Continued

The failure to file the instruments required by sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

John J. May, 91 IBLA 141 (Mar. 24, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Memmott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recordation office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Robert C. Bishop et al., 93 IBLA 199 (Aug. 18, 1986)

MINING CLAIMS--ContinuedABANDONMENT--Continued

A mining claim recordation document sent to the proper office of BLM in an envelope provided by BLM, affixed with the proper postage by weight, and postmarked on or prior to Dec. 30, but returned for additional postage because of the oversize nature of the envelope, will be considered to have been filed in a timely manner pursuant to 43 CFR 3833.0-5(m), when additional postage is affixed, and the letter is received by BLM before Jan. 19 of the following year.

Oro Fino Dredging Co., 94 IBLA 11 (Sept. 18, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the required document that it be filed with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a

MINING CLAIMS--ContinuedABANDONMENT--Continued

mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

An unpatented mining claim located after Oct. 21, 1976, is properly declared abandoned and void where the claimant failed to file either an affidavit of annual assessment work, a notice of intention to hold the claim or a detailed report under 30 U.S.C. § 28-1 (1982) prior to Dec. 31, regardless of whether the claimant was entitled to or granted deferment of annual assessment work.

Marcus D. Schneider, 94 IBLA 239 (Nov. 12, 1986)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

In the case of a mining claim located prior to Oct. 21, 1976, the failure to file one of the instruments required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), on or before Oct. 22, 1979, and prior to Dec. 31 of every year thereafter in the proper BLM office conclusively constitutes abandonment of the mining claim by the owner and renders the claim void.

Steve E. Cate, 97 IBLA 27 (Apr. 23, 1987)

MINING CLAIMS--ContinuedABANDONMENT--Continued

The owner of a mining claim located after Oct. 21, 1976, is required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), to file a notice of intention to hold the claim or evidence of assessment work performed on the claim, in the county where the location notice is of record and in the proper office of BLM prior to Dec. 31 of each year following the calendar year in which the claim is located. Failure to file the instrument required by the statute constitutes an abandonment of the claim.

With respect to an unpatented mining claim located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either a notice of intention to hold the claim or evidence of assessment work both in the local recording office where the notice of location is recorded and in the proper office of BLM prior to Dec. 31 of the year following the calendar year in which the claim was located, as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Oliver B. Kilroy, 99 IBLA 33 (Aug. 31, 1987)

Where a mining claimant inadvertently omits the name and serial number of unpatented mining claims from the notice of intention to hold and there is no other means of identifying the claims on the document, BLM properly declares the claims abandoned and void for failure to comply with 43 CFR 3833.2. Although a filing may be supplemented by subsequent submission of information not required by statute without a statutory presumption of abandonment, there is no authority for amendment of the notice of intention to hold to include a previously omitted claim after the filing deadline.

Ethel Bilotte, 99 IBLA 159 (Sept. 29, 1987)



MINING CLAIMS--ContinuedABANDONMENT--Continued

BLM properly declares a mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), where a mining claimant files a single affidavit of assessment work for a group of claims but omits the name and serial number of a claim and the affidavit provides no other means of identifying the omitted claim.

A decision declaring a mining claim to be abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) will be reversed if the mining claimant had filed an affidavit of assessment work for a group of claims that properly listed the BLM serial number for the claim at issue even though the name of the claim was not stated.

George M. Wilk Wilkinson, 103 IBLA 121 (July 19, 1988)

In the case of mining claims located prior to Oct. 21, 1976, failure to file copies of proofs of labor or notices of intent to hold the claims in the proper BLM office on or before Oct. 22, 1979, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1976), and 43 CFR 3833.2-1(a) (1979), renders the claims abandoned and void.

Henry E. Krizman et al., 104 IBLA 9 (Aug. 15, 1988)

Failure to file affidavits of assessment work or notice of intent to hold prior to Dec. 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

Donald E. Stewart, 104 IBLA 48 (Aug. 23, 1988)

MINING CLAIMS--ContinuedABANDONMENT--Continued

Under 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filing must be made within each calendar year, i.e., on or after Jan. 1, and on or before Dec. 30. Failure to file within the calendar year results in the claim being extinguished and therefore abandoned and void. In order to constitute a notice of intent to hold, a document filed with BLM must satisfy the requirements of 43 CFR 3833.2-3.

Donald L. Howard, Lorena L. Howard, & Ronald C. Howard, 104 IBLA 374 (Sept. 27, 1988)

A mining claim located in a wilderness study area after Oct. 21, 1976, is subject to provision of 43 U.S.C. § 1782(c) (1982), requiring that the land be managed to prevent impairment of the area for wilderness preservation. Where a mining claim located prior to Oct. 21, 1976, becomes abandoned and void for failure to comply with the recordation provisions of 43 U.S.C. § 1744 (1982), a mining claim located in 1979 covering the same area as the void claim is subject to the nonimpairment standard imposed upon claims located in wilderness study areas after Oct. 21, 1976, by 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void.

Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made.

Under 43 CFR 3833.2-4, a mining claimant is excused from filing evidence of annual assessment work or a notice of intention to hold his claim only if a

MINING CLAIMS--ContinuedABANDONMENT--Continued

proper application for a mineral patent is filed and the final certificate has been issued. The pendency of contest or condemnation proceedings does not excuse a claim owner from the statutory filing requirements.

BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Gordon B. Copple, Estate of Janet Copple, Estate of Gust E. Svensson, Jr., 105 IBLA 90 (Oct. 20, 1988)  
95 I.D. 219

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), apply to claims which rely on the provisions of 30 U.S.C. § 38 (1982), to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

The provisions of 30 U.S.C. § 38 (1982), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to lode locations.

Hiram Webb et al., 105 IBLA 290 (Nov. 8, 1988)  
95 I.D. 242

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim must file evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being deemed abandoned and void. Congress assigned the owner of the mining claim the responsibility of making the filings required by 43 U.S.C. § 1744 (1982), and the owner must bear the consequence of filings not timely made. The pendency of contest or condemnation proceedings does not excuse a claim

MINING CLAIMS--ContinuedABANDONMENT--Continued

owner from the statutory filing requirements. BLM has no affirmative obligation to send a mining claim owner a reminder notice concerning the need to make annual filings required by 43 U.S.C. § 1744 (1982).

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

The owner of an unpatented mining claim located on public land is required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 to file evidence of assessment work performed or a notice of intention to hold with the proper BLM office on or before Dec. 30 of each calendar year. By regulation 43 CFR 3833.0-5(m), the Department considers such documents to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows



MINING CLAIMS--ContinuedABANDONMENT--Continued

compliance with that regulation, a BLM decision declaring a claim abandoned and void based on an untimely filing must be reversed.

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

Gary Hennis, 108 IBLA 121 (Mar. 30, 1989)

The conclusive presumption of abandonment for failure to comply with the recordation requirements of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is self-operative and does not depend upon any act or decision of an administrative official. Where a claim is omitted from the express listing of a group of claims for which annual assessment work was performed but was depicted on a map accompanying the affidavit of assessment work, it is wholly a matter of conjecture whether the claim not specifically identified was intended to be listed as the object of assessment work expenditures.

Douglas C. Liechty, 108 IBLA 247 (Apr. 24, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed, results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

MINING CLAIMS--ContinuedABANDONMENT--Continued

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

Under 43 CFR 3833.0-5(m), "timely filed" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law. A proof of labor for a mining claim is timely filed when it was received by January 19, at the Nevada State Office and was in an envelope bearing a clearly dated postmark dated Dec. 26, which is within the period prescribed by law, and BLM's decision declaring the claim abandoned and void is properly reversed.

Patrick J. McClain, 109 IBLA 320 (June 21, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed, results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period,



MINING CLAIMS--Continued

ABANDONMENT--Continued

the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), the owner of an unpatented mining claim located after Oct. 21, 1976, is required to file evidence of assessment work or notice of intention to hold the claim on or before Dec. 30 of each year following the calendar year in which the claim was located. Failure to so file constitutes abandonment of the claim and renders it void.

A decision declaring a mining claim to be abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be reversed if the mining claimant had filed an affidavit of assessment work for a group of claims that sufficiently identifies that claim.

BLM has no affirmative obligation to send a notice to remind a mining claimant of the need to make annual filings or to contract a mining claimant to ascertain which claims are intended to be included in the annual filings required by 43 U.S.C. § 1744 (1982).

Where BLM has declared some claims void, but not others, apparently on the basis of identical information provided by the claimant in a group affidavit of annual assessment work, and where it is possible the claims would have been identified from information contained in the affidavit, the decision shall be set aside and remanded for further proceedings consistent

MINING CLAIMS--Continued

ABANDONMENT--Continued

with the provisions of sec. 314, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Havilah Gold Co., Inc., 112 IBLA 160 (Dec. 11, 1989)

ASSAYS

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

ASSESSMENT WORK

The filing of evidence of assessment work in the county recording office does not constitute compliance with the recordation requirements of 43 CFR 3833.2-1.

Lanny Ray Southard, 86 IBLA 239 (Apr. 30, 1985)

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

Mt. Pinos Development Corp., 87 IBLA 102 (May 30, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

Samuel A. Wright, 86 IBLA 286 (May 13, 1985)

J. E. Stevens, 86 IBLA 291 (May 13, 1985)

Charles H. Hagerty, 87 IBLA 23 (May 21, 1985)

MINING CLAIMS--Continued

## ASSESSMENT WORK--Continued

Where the owner of a mining claim located prior to Oct. 21, 1976, fails to file either a notice of intention to hold, an affidavit of assessment work performed, or a detailed report provided by sec. 28-1 of title 30, U.S.C., prior to Oct. 22, 1979, the claim is deemed conclusively to have been abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the calendar year properly results in the claim being extinguished, and therefore abandoned and void.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), an owner of an unpatented mining claim must file evidence of annual assessment work or notice of intention to hold prior to Dec. 31 of each year. Such filings must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30. Failure to file within the prescribed period properly results in the claim being deemed abandoned and void and, therefore, extinguished.

When enacting sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744

MINING CLAIMS--Continued

## ASSESSMENT WORK--Continued

(1982), Congress intended to extinguish those claims for which timely filings were not made. Failure to file on time, in and of itself, causes the claims to be lost.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

A petition for deferment of assessment work may only be granted pursuant to 30 U.S.C. § 28b (1982) and 43 CFR 3852.1 where "legal impediments" exist which affect the right of a mining claimant to enter upon the claim. In the absence of an adverse administrative determination regarding the validity of a mining claim, where the notice of location indicates the claim was located prior to any segregation of the land by an application for withdrawal, denial of a petition for deferment will be affirmed, where the record discloses appellant had access to the claim, notwithstanding a warning that any attempt to locate or relocate the claim after segregation would be treated as a trespass.

Lyra-Vega II Mining Ass'n, 91 IBLA 378 (Apr. 28, 1986)

Where the requirement of annually filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

The submission of a plan of operations pursuant to 43 CFR 3809 does not satisfy the requirement of filing an affidavit of assessment work or notice of intention to hold a claim imposed by 43 U.S.C. § 1744 (1982).

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

Where the requirement of filing proof of assessment work or a notice of intention to hold applies, such filing must be made within each calendar year, i.e., on or after Jan. 1 and on or before Dec. 30.

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

A party seeking judicial review of a Departmental decision holding the party's mining claim to be abandoned and void for failure to satisfy the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), need not continue to satisfy the annual filing requirements of sec. 314 while judicial review is in progress.

J. L. Block, 98 IBLA 209 (July 1, 1987)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM and there is no evidence that the claimant filed any other document with BLM on that date serves to rebut the presumption of non-filing which is customarily applied where BLM's records indicate a required filing has not occurred. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates that, more likely than not, a required document was in fact received by BLM.

Richard A. Willers, 101 IBLA 106 (Feb. 2, 1988)

Evidence that a mining claimant possesses an acknowledgment receipt card with an attachment purportedly listing those claims for which annual filings were received during the calendar year in question and the fact that BLM does not challenge her characterization of the evidence serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not been made.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)

BLM's allegedly inconsistent conduct in acknowledging receipt of affidavits of assessment work does not provide the corroboration necessary to overcome the presumption that an administrative official has

MINING CLAIMS--Continued

ASSESSMENT WORK--Continued

properly discharged his duties and not lost or misplaced legally significant documents submitted for filing.

Willis B. Grossardt, 102 IBLA 212 (May 10, 1988)

The preliminary injunction issued by the court in National Wildlife Federation v. Burford, 676 F. Supp. 271 (D.D.C. 1985), modified, 676 F. Supp. 280 (D.D.C. 1986), is not a legal impediment which affects a mining claimant's right to enter upon the surface of his claim in order to perform assessment work, where that claim was located in 1983 following the 1983 revocation of a withdrawal and restoration of the land to the operation of the mining laws. A petition for deferment of assessment work on such a claim, which is based upon that injunction, is properly denied.

Roger D. Schoonover, 102 IBLA 318 (June 1, 1988)

Evidence that a mining claimant possesses a return receipt card or certified mail receipt indicating there was a timely filing of a document with BLM serves to rebut the presumption of nonfiling which is customarily applied where BLM's records indicate a required filing has not occurred, absent a showing by BLM that the claimant filed any other document on that date. Although the nature of the document received by BLM is not described on the receipt or card, the existence of this proof indicates it is more probable than not that the required document was received by BLM.

Sydney Green, 109 IBLA 19 (May 24, 1989)

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989)  
96 I.D. 272



MINING CLAIMS--ContinuedASSESSMENT WORK--Continued

Under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), the owner of an unpatented mining claim located after Oct. 21, 1976, is required to file evidence of assessment work or notice of intention to hold the claim on or before Dec. 30 of each year following the calendar year in which the claim was located. Failure to so file constitutes abandonment of the claim and renders it void.

Havilah Gold Co., Inc., 112 IBLA 160 (Dec. 11, 1989)

COMMON VARIETIES OF MINERALSGenerally

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

United States v. Anna Wirz, 89 IBLA 350 (Nov. 20, 1985)

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, *i.e.*, that the deposit could be mined, removed, and marketed at a

MINING CLAIMS--ContinuedCOMMON VARIETIES OF MINERALS--ContinuedGenerally--Continued

profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 55 (Dec. 19, 1986)

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Generally--Continued

In order to establish that a deposit of building stone is an uncommon variety locatable under the Act of July 3, 1955, 30 U.S.C. § 611 (1982): (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market or reduced cost of production resulting in greater profit.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

A mining claimant who asserts entitlement to consideration of group development of his building stone claims must provide evidence that such claims are susceptible to group development, including identification of the specific claims involved, their relative location, and cost and production figures for such claims.

United States v. Frank & Wanita Melluzzo, 105 IBLA 252 (Nov. 4, 1988)

#### Special Value

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for

## MINING CLAIMS--Continued

### COMMON VARIETIES OF MINERALS--Continued

#### Special Value--Continued

"common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

The existence of a unique property in a deposit of building stone which imparts a distinct and special value reflected by either a higher price for the product or reduced costs of production resulting in a higher profit must be predicated on a unique property inherent in the deposit itself and not on extrinsic factors such as highway access or proximity to market resulting in lower transportation costs.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

#### Unique Property

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

MINING CLAIMS--ContinuedCOMMON VARIETIES OF MINERALS--ContinuedUnique\_Property--Continued

The existence of a unique property in a deposit of building stone which imparts a distinct and special value reflected by either a higher price for the product or reduced costs of production resulting in a higher profit must be predicated on a unique property inherent in the deposit itself and not on extrinsic factors such as highway access or proximity to market resulting in lower transportation costs.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

CONTESTS

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

MINING CLAIMS--ContinuedCONTESTS--Continued

Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)



MINING CLAIMS--ContinuedCONTESTS--Continued

The final ruling of a Government contest of unpatented mining claims which are the subject of amended locations where the claims were declared null and void for lack of discovery of a valuable mineral deposit, which declaration was sustained on appeal, will not be applied to amended locations where the record shows that these amended locations were specifically excluded from the contest action.

Jon Zimmers, 90 IBLA 106 (Dec. 23, 1985)

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 55 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Memmott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

MINING CLAIMS--ContinuedCONTESTS--Continued

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined the land within a claim and found the quantity and quality of the minerals insufficient to support a finding of discovery, a prima facie case is established.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government

MINING CLAIMS--Continued

## CONTESTS--Continued

contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

BLM may not properly reject a plan of operations for a mining claim on the basis that the claimant failed to answer the contest complaint, where the record shows that BLM failed to serve a copy of the complaint on the person who actually owned the claim at the time the complaint was issued, and, thus, the contest was a nullity.

Patsy A. Brings, 98 IBLA 385 (Aug. 5, 1987)

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. When a mining claimant fails to do so, he assumes the risk that the mineral examiner will be unable to verify a discovery. In such case an unsupported allegation that the samples taken by the examiner were not representative of the mineral deposit will not overcome a prima facie case that there is no discovery.

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain

MINING CLAIMS--Continued

## CONTESTS--Continued

mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed

MINING CLAIMS--ContinuedCONTESTS--Continued

and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private patent proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988) 95 I.D. 49

MINING CLAIMS--ContinuedCONTESTS--Continued

A decision by an Administrative Law Judge who did not preside over a hearing in a mining claim contest will not be overturned for that reason where an evaluation of the credibility of witnesses was not a material factor in reaching the decision.

When the Government charges in a contest complaint that a mining claim is not being held in good faith for mining purposes and at the hearing the record establishes that the claimants have occupied a cabin on the claim for many years; that the claimants' mining activities are no more than recreational; and that such occupancy is not reasonably incident to the mining activities undertaken, the Administrative Law Judge may properly conclude that the claim is not being held in good faith for mining purposes.

United States v. Jean M. McMullin, David S. McMullin, 102 IBLA 276 (May 24, 1988)

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a finding of discovery, a prima facie case is established.

United States v. Bruce L. Gillette et al., 104 IBLA 269 (Sept. 13, 1988)

In a private mining claim contest, the burden of proof is on the contestant to establish the invalidity of the claim by a preponderance of the evidence.

Patentees under the Stock-Raising Homestead Act of 1916 have an adverse interest sufficient to bring a private contest against allegedly invalid mining claims located for minerals reserved to the United States.

Larry Morales, William Thomas, & T. & M. Land & Cattle Co. v. John A. Baudendistel, Brian A. Baudendistel, & John H. Sankot, 105 IBLA 211 (Nov. 2, 1988)



MINING CLAIMS--ContinuedCONTESTS--Continued

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

MINING CLAIMS--ContinuedCONTESTS--Continued

When the Government contests a mining claim alleging lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case. When a Government mineral examiner testifies that he has examined a mining claim, and, based upon his examination, concludes the quantity and quality of the minerals is insufficient to support a discovery, a prima facie case is established.

Government mineral examiners are not required to perform discovery work for claimants or explore beyond a claimant's exposed workings. It is therefore incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where a mining claimant's alleged discovery point is inaccessible due to caving, the Government is not responsible for restoring the accessibility of the site in order to conduct a mineral examination.

The motivation of the Forest Service in seeking the initiation of a contest against a mining claim located on National Forest lands is irrelevant, and once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim and the Bureau of Land Management has determined that the elements of a contest are present, it is not the function of the Board of Land Appeals to inquire into the reasons or the justifications for the initiation of such a proceeding.

United States v. Bruce V. Opperman, 111 IBLA 152 (Oct. 2, 1989)

DETERMINATION OF VALIDITY

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virg-in, 84 IBLA 347 (Jan. 17, 1985)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

prudence would be justified in the further expenditure of time and means to develop a paying mine.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

Where the United States contests a mining claim for lack of discovery, the Government must go forward with sufficient evidence to establish prima facie the invalidity of the contested claims. When the Government's prima facie case has been made, the burden then shifts to the claimant to overcome this showing by a preponderance of the evidence.

Contestees fail to overcome the Government's prima facie case where assay results are not offered into evidence by contestees, the location of samples is undisclosed, the quantity of gold-bearing material is uncertain, fire assays are used to determine the gold content of a placer claim, and contestees fail to answer a charge of mathematical miscalculation.

United States v. Horace Chapman et al., 87 IBLA 216 (June 18, 1985)

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)



MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

Whether a prudent man would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine on a mining claim is an objective test, and, thus, it does not depend on the circumstances of the individual mining claimant. When in a contest of a patent application, the evidence shows that prior to July 23, 1955, a mining claimant extracted and sold decorative building stone from a group of claims, but that the actual net return was meager, the claimant has failed to show that a person of ordinary prudence would have attempted to develop a valuable mine.

United States v. Anna Wirz, 89 IBLA 350 (Nov. 20, 1985)

A deposit of gravel suitable for roadbuilding will be considered a common variety of gravel under sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), rather than a locatable mineral, where the record establishes the widespread availability of other deposits of gravel equally suitable for such purpose, notwithstanding the fact that the gravel deposit might be developed more economically because of the size and hardness of the gravel.

Sandstone will be considered a common variety of mineral under sec. 3 of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1982), where, although the red coloration of the stone may be unique, there is no evidence that because of the coloration the stone would command a higher price on the market.

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns

MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can be obtained from mining the locatable mineral in order to support a discovery.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode



MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent down-dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)  
93 I.D. 369

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George E. Krier, 92 IBLA 101 (May 30, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

As a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim or claims by a preponderance of the evidence. Where the contestant fails to do so as to all or parts of 16 of 55 contested bentonite claims, the contest is properly dismissed as to those 16 claims. The remaining claims are properly found to be invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986)  
93 I.D. 211

MINING CLAIMS--Continued

## DETERMINATION OF VALIDITY--Continued

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an

MINING CLAIMS--Continued

## DETERMINATION OF VALIDITY--Continued

investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 55 (Dec. 19, 1986)

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)



MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abnegate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim, minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made



MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

When a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs

MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials, are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery, of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

The lack of evidence of prior sales of cinders from a claim is not conclusive on the issue of marketability. However, where the evidence shows that exploitation of cinders from the claim and the market for such cinders, with the exception of use by the state highway authority without compensation to claimants, was extremely limited at the time of the withdrawal of common varieties of cinders in 1955, a conclusion after a hearing that there was no market for the cinders which would justify a person of reasonable prudence in expending his time and money to develop a paying mine will be affirmed.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

MINING CLAIMS--Continued

DETERMINATION OF VALIDITY--Continued

A petition for reconsideration may be granted only in extraordinary circumstances where good cause is shown therefor. Evidence of the existence of a market for cinders at the time of the withdrawal of such deposits from location in 1955 will not support reconsideration of a decision adjudicating the validity of a mining claim reached after an evidentiary hearing where the existence of such a market was recognized both by the Administrative Law Judge and the Board on review. Where the contest and the appeal were decided on the evidence that cinders from the claims at issue were not marketable, i.e., could not be extracted, removed, and marketed at a profit in 1955, reconsideration is not justified by evidence that there was a market for cinders at the time.

United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70 (Apr. 14, 1988)

BLM has a duty to exercise its authority over mining claims to the end that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

In order to establish that a deposit of building stone is an uncommon variety locatable under the Act of July 3, 1955, 30 U.S.C. § 611 (1982): (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material



MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

commands in the market or reduced cost of production resulting in greater profit.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. Thus, the existence of reserves on adjacent mining properties controlled by the claimant is relevant to the question of whether there is a reasonable prospect of developing a paying mine.

United States v. New York Mines, Inc., 105 IBLA 171 (Oct. 31, 1988) 95 I.D. 223

In a private mining claim contest, the burden of proof is on the contestant to establish the invalidity of the claim by a preponderance of the evidence.

There has been no discovery of a valuable mineral deposit within a lode mining claim unless there has been physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the

MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

mineral. A mining claim is properly declared invalid where there is no evidence concerning the quantity of mineral to be found on the claim and the only evidence of quality establishes the value far below the cost of mining, removing, and marketing the mineral.

Larry Morales, William Thomas, & T. & M. Land & Cattle Co. v. John A. Baudendistel, Brian A. Baudendistel, & John H. Sankot, 105 IBLA 211 (Nov. 2, 1988)

An Administrative Law Judge's findings of credibility will receive considerable deference when reviewed on appeal; thus, where an Administrative Law Judge finds that the testimony of a witness in a mining claim contest has been impeached by prior inconsistent statements made in previous contests, that finding will also be accorded considerable deference.

A mining claimant who asserts entitlement to consideration of group development of his building stone claims must provide evidence that such claims are susceptible to group development, including identification of the specific claims involved, their relative location, and cost and production figures for such claims.

United States v. Frank & Wanita Melluzzo, 105 IBLA 252 (Nov. 4, 1988)

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights



## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198  
(June 12, 1989) 96 I.D. 272

When the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

## MINING CLAIMS--Continued

### DETERMINATION OF VALIDITY--Continued

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

A mining claimant has standing to appeal from decisions declaring his claims invalid.

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144  
(Aug. 10, 1989)

The motivation of the Forest Service in seeking the initiation of a contest against a mining claim located on National Forest lands is irrelevant, and once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim and the Bureau of Land Management has determined that the elements of a contest are present, it is not the function of the Board of Land Appeals to inquire into the reasons or the justifications for the initiation of such a proceeding.

United States v. Bruce V. Opperman, 111 IBLA 152  
(Oct. 2, 1989)

In order to establish a discovery, there must be exposed within the limits of a claim a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit. Where the evidence in the record fails to establish that gold and silver can be recovered from placer gravels using either a backhoe and trommel or suction dredges in such a manner that the value of the recovered metals will

MINING CLAIMS--ContinuedDETERMINATION OF VALIDITY--Continued

exceed reasonable anticipated costs of removal, no discovery has been established.

United States v. Joseph Laczkowski, 111 IBLA 165 (Oct. 5, 1989)

DISCOVERYGenerally

A mineral patent applicant bears the burden of showing that he has made a valuable mineral discovery and therefore the patent application must contain sufficient economic and geologic information, such as the description of the discovery points, the workings and the improvements on the claim, and the sampling techniques, to show entitlement and to justify a field examination of the mining claim for the purpose of verifying the information provided.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

A prima facie case against the validity of a mining claim is established when Government mineral examiners testify that they have examined the claim at issue and found no evidence of mineralization sufficient to support a discovery.

The burden upon a contestee in a mining claim contest is to overcome a prima facie case of invalidity by a preponderance of the evidence. The presumptions raised by a prima facie showing of nonmineralization are successfully rebutted where the claimant presents evidence which preponderates on the issue of whether the identified mineral can be mined, removed, and disposed of at a profit.

United States v. Robert L. Hamersley et al., 84 IBLA 377 (Jan. 28, 1985)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

A discovery exists where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.

The "marketability test," a refinement of the "prudent man test," requires a claimant to show that a mineral can be extracted, removed, and marketed at a profit. The latter does not set forth a distinct standard, but rather is regarded as complementary to the "prudent man test." Factors such as the cost of extraction, removal, and marketing are relevant considerations to determine whether a person of ordinary prudence would be justified in the further expenditure of time and means to develop a paying mine.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

A finding that a mining claimant has not overcome a prima facie case of invalidity will be affirmed where the evidence shows that the value of the deposit to be mined is less than the cost of mining the deposit.

United States v. Craig Anderson, 88 IBLA 316 (Sept. 18, 1985)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

Evidence of the existence of mineralization which may encourage further exploration to determine the existence of minerals of such quality and quantity as would justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)



MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim, minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

United States v. Louis Wolk, 100 IBLA 167 (Dec. 3, 1987)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

Evidence of the existence of mineralization which may encourage further exploration to determine the existence of minerals of such quality and quantity as would justify the expenditure of funds for the development of a mine does not establish the discovery of a valuable mineral deposit.

Isolated showings of high gold values are not sufficient by themselves to establish the discovery of a valuable mineral deposit.

United States v. Bruce L. Gillette et al., 104 IBLA 269 (Sept. 13, 1988)

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

It has been recognized that the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of developing a paying mine. Thus, the existence of reserves on adjacent mining properties controlled by the claimant is relevant to the question of whether there is a reasonable prospect of developing a paying mine.

United States v. New York Mines, Inc., 105 IBLA 171 (Oct. 31, 1988) 95 I.D. 223



MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

There has been no discovery of a valuable mineral deposit within a lode mining claim unless there has been physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral. A mining claim is properly declared invalid where there is no evidence concerning the quantity of mineral to be found on the claim and the only evidence of quality establishes the value far below the cost of mining, removing, and marketing the mineral.

Larry Morales, William Thomas, & T. & M. Land & Cattle Co. v. John A. Baudendistel, Brian A. Baudendistel, & John H. Sankot, 105 IBLA 211 (Nov. 2, 1988)

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedGenerally--Continued

In order to establish a discovery, there must be exposed within the limits of a claim a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit. Where the evidence in the record fails to establish that gold and silver can be recovered from placer gravels using either a backhoe and trommel or suction dredges in such a manner that the value of the recovered metals will exceed reasonable anticipated costs of removal, no discovery has been established.

United States v. Joseph Laczkowski, 111 IBLA 165 (Oct. 5, 1989)

Geologic\_Inference

Though geologic inference can be used, where exposures exist which show high and relatively consistent values, to infer sufficient quantity and quality of similar mineralization beyond the actual exposed areas such that a valuable mineral deposit may be said to exist, resort to geologic inference cannot be justified on the basis of data which is shown to be intrinsically flawed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

While geologic inference cannot be used to show the existence of a mineral deposit, where an exposure has been developed which shows high and relatively consistent values, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man may be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Projection of inferred reserves on the basis of the quantity of ore removed in past mining operations on the vein will not support a discovery where there is evidence of a substantial



MINING CLAIMS--ContinuedDISCOVERY--ContinuedGeologic\_Inference--Continued

change in the character of the mineral deposit in the vein from the area previously mined to the deposit remaining.

United States v. New York Mines, Inc., 105 IBLA 171 (Oct. 31, 1988) 95 I.D. 223

Marketability

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery, of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

Whether a prudent man would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine on a mining claim is an objective test, and, thus, it does not depend on the circumstances of the individual mining claimant. When in a contest of a patent application, the evidence shows that prior to July 23, 1955, a mining claimant extracted and sold decorative building stone from a group of claims, but that the actual net return was meager, the claimant has failed to show that a person of ordinary prudence would have attempted to develop a valuable mine.

United States v. Anna Wirz, 89 IBLA 350 (Nov. 20, 1985)

A mining claimant will be held not to have overcome the Government's prima facie case of the lack of discovery of a valuable deposit of bentonite where he has not rebutted evidence that the bentonite cannot be mined, removed and marketed at a profit. A mining claimant is not permitted to aggregate the returns obtainable from sale of a nonlocatable common variety of mineral removed as overburden with those which can

MINING CLAIMS--ContinuedDISCOVERY--ContinuedMarketability--Continued

be obtained from mining the locatable mineral in order to support a discovery.

United States v. Elmer G. Thomas et al., 90 IBLA 255 (Jan. 31, 1986)

A bentonite mining claimant is not required to show each claim he has located is capable of independently supporting a paying mine. Rather, marketability of a known bentonite clay deposit, a low-grade, high-volume clay material, may be demonstrated by showing the feasibility of mining several claims under a single operation where each claim is shown to contain sufficient mineralization to qualify for inclusion within the mined group.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an

MINING CLAIMS--ContinuedDISCOVERY--ContinuedMarketability--Continued

investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 55 (Dec. 19, 1986)

The requirement that a mining claimant show that the mineral discovered on the claim is presently marketable at a profit simply means a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

United States v. Norman A. Whittaker, 95 IBLA 271 (Jan. 29, 1987)

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

Under the marketability test, a mining claimant must show that, as a present fact, taking into consideration historic price and cost factors as well as the likelihood of their continuance or change, there is a reasonable likelihood of success that a paying mine can be developed.

The holding of a mining claim solely as a reserve for speculative future development does not impart validity to the claim.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

MINING CLAIMS--ContinuedDISCOVERY--ContinuedMarketability--Continued

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

The lack of evidence of prior sales of cinders from a claim is not conclusive on the issue of marketability. However, where the evidence shows that

MINING CLAIMS--ContinuedDISCOVERY--ContinuedMarketability--Continued

exploitation of cinders from the claim and the market for such cinders, with the exception of use by the state highway authority without compensation to claimants, was extremely limited at the time of the withdrawal of common varieties of cinders in 1955,<sup>a</sup> a conclusion after a hearing that there was no market for the cinders which would justify a person of reasonable prudence in expending his time and money to develop a paying mine will be affirmed.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

Where a mineral patent application has been filed and the mineral claimant has tendered the full purchase price for the claim, a subsequent inquiry as to whether a discovery of a valuable mineral deposit has been shown to exist is properly directed to whether or not the discovery was established by the date of the entry, i.e., no later than the date of issuance of final certificate.

United States v. Norman A. Whittaker (On Reconsideration), 102 IBLA 162 (May 3, 1988)

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

United States v. New York Mines, Inc., 105 IBLA 171 (Oct. 31, 1988)  
95 I.D. 223

MINING CLAIMS--ContinuedDISCOVERY--ContinuedMarketability--Continued

A mining claimant who asserts entitlement to consideration of group development of his building stone claims must provide evidence that such claims are susceptible to group development, including identification of the specific claims involved, their relative location, and cost and production figures for such claims.

United States v. Frank & Wanita Melluzzo, 105 IBLA 252 (Nov. 4, 1988)

ENVIRONMENT

A finding that proposed gold dredging operations will not have a significant impact on the human environment, and that no environmental impact statement is required, is affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize the environmental impact. Such a determination is not overcome by a stated difference of opinion, unsupported by independent proof, alleging the environmental analysis is erroneous.

Tulkisarmute Native Community Council et al., 88 IBLA 210 (Aug. 28, 1985)

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987)  
94 I.D. 56



MINING CLAIMS--ContinuedEXTRALATERAL RIGHTS

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

The primary consequence of a lode mining claimant's failure to locate his mining claim boundaries according to the actual course of the lode or vein, whether by lack of care or lack of data, is that the mining claimant may be limited in his extralateral rights to the down-dip extension of the vein.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent down-dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning

MINING CLAIMS--ContinuedEXTRALATERAL RIGHTS--Continued

the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)  
93 I.D. 369

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

MINING CLAIMS--ContinuedEXTRALATERAL RIGHTS--Continued

A lode mining claim located partially on land withdrawn or segregated from mineral location is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Amelia Marglin Whitson, 101 IBLA 1 (Jan. 20, 1988)

HEARINGS

No hearing is required to declare a mining claim invalid when there is no issue of material fact and it is clear from the record that at the time of location of the claim the land was not open to location.

Nancy Lee Mines, Inc., 89 IBLA 257 (Oct. 31, 1985)

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

MINING CLAIMS--ContinuedHEARINGS--Continued

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

LANDS SUBJECT TO

Where lands were patented under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the non-mineral character of the land so patented, and the subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States.

Land acquired by the United States does not become public land by the mere process of its acquisition, and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

BLM properly determined that unpatented mining claims were null and void ab initio when they were located at a time when the land was withdrawn from mineral entry by Executive order for a military reservation and the withdrawal has not been revoked,

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

even if the land is no longer being used for military purposes.

Guadalupe Resources Corp., 84 IBLA 344 (Jan. 16, 1985)

When the United States patents "nonmineral" land to the State of Washington in exchange for State land located within a national forest, the issuance of a patent constitutes a conclusive determination by the United States that the land was nonmineral in character, and, in the absence of fraud, any subsequent identification or discovery of minerals thereon does not operate to void the conveyance by the United States or to create a reservation of the minerals in the United States. Therefore, mining claims located on "nonmineral" land patented to the State without reservation of the mineral estate are null and void ab initio, even though the State at one time mistakenly concluded that the patent did not convey the mineral estate.

David C. Brookens, 85 IBLA 1 (Jan. 30, 1985)

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

Mining claims located upon lands withdrawn from mineral entry are properly declared null and void ab initio.

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims, and mining claims located on such land after it is patented are properly declared null and void ab initio.

Pat Ray McClane, 85 IBLA 241 (Mar. 4, 1985)

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)



MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Dilley, 87 IBLA 150 (June 11, 1985)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

Although the Board has on one occasion undertaken an *in pari materia* consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an *in pari materia* consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985)

Where land has been patented under a railroad land grant and only the surface estate has been reconveyed to the United States, a mining claim located on such land is properly declared null and void ab initio because the United States does not own the mineral deposits in the lands.

August F. Plachta, 88 IBLA 304 (Sept. 16, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law,

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are void ab initio.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Where the Government stipulates on appeal that a protective withdrawal noted on the public lands records in 1965 was merely temporary, as alleged by appellant seeking to prove that under the Pickett Act, 43 U.S.C. §§ 141-142, (1970) the temporarily withdrawn lands were open to location for metalliferous minerals, the Board will defer to the parties' agreement as to the nature of the withdrawal. That the withdrawal is found to be merely temporary does not alter the fact that the general public was led to believe otherwise by virtue of the withdrawal's notation on the public land records, and, under the "tract book" or "notation rule" principle, the existence of a withdrawal entry on these records, whether valid or invalid, bars any conflicting appropriation of the land.

Northwest Exploration, Inc. (On Judicial Remand), 89 IBLA 189 (Oct. 17, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)



MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Where a lode mining claim is located partially on patented land or land in which the United States does not hold a mineral interest, such a claim is not properly held null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands onto which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Where a mining claim is located entirely on patented land or land in which the United States does not have a mineral interest, such claim is properly held to be null and void ab initio.

Nancy Lee Mines, Inc., 89 IBLA 257 (Oct. 31, 1985)

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are not subject to location under the mining laws in the absence of specific statutory or regulatory authorization. Minerals reserved to the United States in a patent to the City of Rifle, Colorado, are not subject to the mining law, since no statute or regulation provides for their disposition under the mining law.

Richard G. Bradley, 89 IBLA 281 (Nov. 8, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plat, regardless of what other records may have indicated regarding the validity of the applications. The ordinary citizen contemplating a proposed use or appropriation of the public lands would quite reasonably look to lands other than those within T. 10 N., R. 2 E., Seward Meridian, upon discerning from the master title plat for this township that it was included in State selection applications. Further, there is nothing on the face of the master title plat that would suggest the State selection entries were invalid.

Although the Board may undertake an in pari materia consideration of various land status records (e.g., the master title plat, historical index, and other use plats) as a further method of determining whether public lands were appropriated at a particular time, this is generally done only where a conflict appears between the master title plat and such other records. Here, an in pari materia consideration of other public land records in conjunction with the master title plat fails to establish that Chugach National Forest lands (on which appellants' mining claims were located) were excluded from any of the three State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1) (c)(3) (1982), where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

John R. & Vickie L. Malone, 89 IBLA 341 (Nov. 13, 1985)

BLM may properly declare a mining claim located on lands withdrawn and closed to mineral entry null and void ab initio.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

Lands previously conveyed to the State of Arizona are not public lands subject to mineral location, and a mining claim located after patent to the state is null and void.

Lynn M. Sheppard, 90 IBLA 23 (Dec. 4, 1985) 92 I.D. 613

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required prior to a decision holding that such claims are invalid.

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

In the absence of a Master Title Plat or other appropriate land use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the Native selection.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

Basil S. Bolstridge, Elizabeth W. Bolstridge, 90 IBLA 54 (Dec. 10, 1985)



MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982) where the implementing regulations of the Department do not provide that the filing of such selection application segregates the land from other appropriation.

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

Under the "notation" or "tract book" rule, when a state selection application is filed and noted on official land office records, the notation of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

Neither laches nor estoppel will bar a decision that a mining claim is void from its inception, notwithstanding the claimant's good faith expenditure of labor and money for the benefit of the claim. BLM has no affirmative duty to mineral locators to promptly check the legal status of every claim filed with them and to apprise a claimant of its findings; and claimant's reliance upon erroneous information from BLM employees cannot create rights not authorized by law.

David D. Beal, 90 IBLA 91 (Dec. 23, 1985)

Under the "notation" rule, BLM may properly declare an unpatented mining claim null and void ab initio where it is located at a time when the land is noted on the public land records as subject to a state selection, even though the notation is erroneous because the selection has already been invalidated by a BLM decision.

John J. Schnabel, Josephine Jurgeleit, 90 IBLA 147 (Dec. 30, 1985)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.



MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 14, 1904, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Bullard, Harold W. Bullard, 91 IBLA 391 (Apr. 29, 1986)

Lands which were acquired under the Weeks Act for a national forest are not subject to location of mining claims under 30 U.S.C. § 22 (1982). Such "acquired lands" are properly distinguished from "public domain" or "public lands" withdrawn or reserved for national forest purposes which are subject to mineral entry under 16 U.S.C. §§ 475, 478 (1982).

Melvin Franzen, H. Diane Golby, 92 IBLA 20 (May 6, 1986)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a mining claim located on land patented without a mineral reservation null and void ab initio. However, where the record indicates the claim may only partially be located on patented land, the decision will be set aside and the case will be remanded to BLM for a readjudication of the validity of the claim.

Noranda Exploration, Inc., 92 IBLA 61 (May 19, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon E. Griffin, 92 IBLA 87 (May 28, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George E. Krier, 92 IBLA 101 (May 30, 1986)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a power site withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

The Bureau of Land Management lacks jurisdiction to adjudicate the status of unpatented mining claims located on lands subsequently selected by the State of Alaska and tentatively approved by BLM which lands were thereafter conveyed to the State by sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act. Hence, a decision declaring such claims null and void will be reversed. Since such lands are no longer Federal lands, a decision refusing to accept assessment work filings for such claims will be affirmed.

William J. Smith, 94 IBLA 75 (Sept. 30, 1986)

Lands set apart as an Indian reservation cease to be a part of the public domain, and a mining claim located on Indian lands not opened to mineral entry is null and void ab initio.

Haldon Mining, 94 IBLA 93 (Oct. 1, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

the location made while the lands were segregated from mineral entry.

Harold E. De Roux, 94 IBLA 350 (Nov. 28, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)



MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or non-metalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

Mining claims located on land unavailable for location and entry under the mining laws are null and void ab initio.

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Mining claims located on land which was segregated in accordance with 43 CFR 2201.1(b) from appropriation under the mining laws by publication in the Federal Register of notice of realty action proposing the land for disposal by exchange are properly declared null and void ab initio.

A lode mining claim located partially on land withdrawn or segregated from mineral location is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Amelia Marglin Whitson, 101 IBLA 1 (Jan. 20, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Public Land Order No. 5251 continued in effect the withdrawal of lands in Alaska from location and entry under the mining laws that was initiated by the earlier Public Land Order No. 5179.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Harges Mining Co., 102 IBLA 169 (May 3, 1988)

The notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

Mining claims located on lands that are withdrawn from mineral entry both by an act of Congress and by a duly published public land order on the date of location are properly declared null and void ab initio.

Where lands covered by mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective. However, when the claims terminate, the withdrawal becomes effective, eo instanti, to the lands covered by the entry, thus

MINING CLAIMS--ContinuedLANDS SUBJECT TO--Continued

closing them to future entries. No further action is required to effect the withdrawal.

The location date for mining claims situated on lands withdrawn from mineral entry by Congress for inclusion in the Wrangell-St. Elias National Park will not relate back to mining claims located prior to the withdrawal, where the previous mining claims were conclusively deemed to be abandoned and void for failure to file copies of proofs of labor or notices of intent to hold as required by sec. 314 of the Federal Land Policy and Management Act of 1976.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Donald E. Stewart, 104 IBLA 48 (Aug. 23, 1988)

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a first-form reclamation withdrawal, which segregated a tract from mineral entry thereby reinstating the terms of the withdrawal, a mining claim subsequently located on that tract is properly declared null and void ab initio.

George & Reda Howard, 104 IBLA 114 (Aug. 31, 1988)

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable

MINING CLAIMS--ContinuedLANDS SUBJECT TO--Continued

to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154 (Sept. 6, 1988) 95 I.D. 142

Placer mining claims are properly declared null and void ab initio if, at the time of location, the land is withdrawn from prospecting, location, entry, and purchase under the mining laws of the United States.

With limited exceptions, hardrock minerals such as gold and silver are not subject to leasing by the United States.

Revocation of a withdrawal of lands subsequent to the date of location of placer mining claims will not retroactively validate those claims.

Kathryn J. Story, 104 IBLA 313 (Sept. 15, 1988)



MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

A patent for land within the Black Hills National Forest, which provides, in accordance with sec. 3 of the Act of June 11, 1906, as amended, ch. 3074, 34 Stat. 234 (1906), that all entries are subject to the lode mining laws of the United States, does not constitute a reservation of minerals to the United States, and a lode mining claim thereafter located on that land is null and void ab initio.

Homestake Mining Co., 104 IBLA 357 (Sept. 23, 1988)

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 4601-18(c) (1982), cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

If any part of a lode mining claim is located on lands open to mineral entry, it cannot be deemed null and void ab initio because a portion of the claim is also on withdrawn lands.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

An agreement between one of two original locators of a mining claim and a relocater of the claim that the original locator would refrain from filing an affidavit of labor in order to permit the relocation of exactly the same claim did not result in an amendment of the original claim, because the relocation established a new date of claim location and the parties intended to extinguish the original claim and substitute the relocater for the original locators of the claim.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Mining claims located on land which has been segregated from appropriation under the mining laws by publication in the Federal Register of a notice of classification under the Classification and Multiple Use Act of 1964 are properly declared null and void ab initio. A subsequent modification or revocation of the classification order will not retroactively validate locations made while the lands were segregated from mineral entry.

Pluess-Stauffer (California), Inc., 106 IBLA 198 (Dec. 21, 1988)

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wexselblatt, 106 IBLA 304 (Jan. 5, 1989)

Mining claims located on land patented by the United States without a mineral reservation or on land segregated from entry under the mining laws are null and void ab initio.

Santa Fe Resources, Inc., 106 IBLA 374 (Jan. 19, 1989)

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

A mining claim located on lands subject to a first-form withdrawal at the time of location is null and void ab initio.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims

MINING CLAIMS--Continued

## LANDS SUBJECT TO--Continued

Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

claims located on such lands are properly declared null and void ab initio.

Golden Reward Mining Co., 111 IBLA 217 (Oct. 16, 1989)  
96 I.D. 452

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority, and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

Mining claims located on land unavailable for location and entry under the mining laws are null and void ab initio.

A placer mining claim partially located on land patented without a mineral reservation to the United States is properly declared null and void to the extent it includes such land.

John Wright, 112 IBLA 233 (Dec. 20, 1989)

LITIGATION

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed



MINING CLAIMS--ContinuedLITIGATION--Continued

and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

LOCATION

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virg-in, 84 IBLA 347 (Jan. 17, 1985)

Location of a mining claim is a purchase of public land within the meaning of 43 U.S.C. § 11 (1982) and the claim may be declared void where it is shown that the locator's spouse who is an employee of the Bureau of Land Management (BLM) has a direct or indirect interest in the claim because "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

A mining claim is properly declared to be void ab initio, in accordance with 43 CFR 20.735-24, where the locator is the spouse of a BLM employee and the mining claim is located on land administered or controlled by the U.S. Department of the Interior.

Because the Department of the Interior retains control over the validity of mining claims on U.S. Forest Service lands administered by the Department of Agriculture, location of mining claims by the spouse of a BLM employee on such lands is prohibited by 43 CFR 20.735-24.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985) 92 I.D. 83

MINING CLAIMS--ContinuedLOCATION--Continued

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

Under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), and 43 CFR 3833.1-2, the owner of an unpatented lode or placer mining claim located after Oct. 21, 1976 must file in the proper BLM office, within 90 days after the location of such claim, a copy of the official record of the notice or certificate of location. Failure to do so is deemed conclusively to constitute an abandonment of the claim by the owner. 43 U.S.C. § 1744(c) (1982).

Robert W. Van Wyck, 87 IBLA 245 (June 19, 1985)

There is no limit to the number of claims a person may locate.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

Where one asserts the location of a tunnel site claim and meets the recordation requirements for such a claim, it will be considered a tunnel site claim. However, where the claimant later seeks to "amend" the tunnel site claim into lode claims, such claims must be considered null and void because a tunnel site cannot be amended into lode claims since a tunnel site is not a mining claim, rather it is a right-of-way.

Elsworth & Dolores Loveland, 89 IBLA 205 (Oct. 25, 1985)

MINING CLAIMS--ContinuedLOCATION--Continued

Where a mining claimant seeks to amend mining claims and it is subsequently determined the original claims are void for lack of discovery of a valuable mineral, the amendments may not properly be considered amended locations as they cannot relate back to amend underlying locations which are void. Further, the attempted amendments need not be treated as new locations where the record shows they cover substantially the same lands included in previous claims declared void by the Department in prior adjudications, and where it appears the miner's clear intent was to have these filings considered only as amendments to the prior void locations.

Jon Zimmers, 90 IBLA 106 (Dec. 23, 1985)

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

United States v. Lester Miller & Arlene M. Miller, 91 IBLA 245 (Apr. 8, 1986)

MINING CLAIMS--ContinuedLOCATION--Continued

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

MINING CLAIMS--ContinuedLOCATION--Continued

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel site is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted on the claim as recited in the recorded certificate of location.

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right which will make the claim invalid.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

MINING CLAIMS--ContinuedLOCATION--Continued

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)



MINING CLAIMS--ContinuedLOCATION--Continued

Where lands covered by mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective. However, when the claims terminate, the withdrawal becomes effective, eo instanti, to the lands covered by the entry, thus closing them to future entries. No further action is required to effect the withdrawal.

The location date for mining claims situated on lands withdrawn from mineral entry by Congress for inclusion in the Wrangell-St. Elias National Park will not relate back to mining claims located prior to the withdrawal, where the previous mining claims were conclusively deemed to be abandoned and void for failure to file copies of proofs of labor or notices of intent to hold as required by sec. 314 of the Federal Land Policy and Management Act of 1976.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

The United States is not barred by the equitable defense of estoppel from enforcing public land laws. Moreover, BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

MINING CLAIMS--ContinuedLOCATION--Continued

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

Where the evidence establishes that a mineral location made in 1954 when the land embraced thereby was open to location was not an amendment of an earlier location made in 1947 when the land was closed to mineral entry, a BLM decision holding the 1954 location null and void ab initio will be reversed.

American Colloid Co., 112 IBLA 228 (Dec. 19, 1989)

LODE CLAIMS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly

MINING CLAIMS--Continued

## LODE CLAIMS--Continued

covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

MINING CLAIMS--Continued

## LODE CLAIMS--Continued

The primary consequence of a lode mining claimant's failure to locate his mining claim boundaries according to the actual course of the lode or vein, whether by lack of care or lack of data, is that the mining claimant may be limited in his extralateral rights to the down-dip extension of the vein.

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex and the mining claims located over the apparent down-dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral

MINING CLAIMS--ContinuedLODE CLAIMS--Continued

right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)  
93 I.D. 369

Mining claims wholly located on lands patented without a mineral reservation to the United States are properly declared null and void ab initio. However, a lode mining claim located partially on withdrawn or patented land is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

James W. Phillips, 92 IBLA 58 (May 13, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

MINING CLAIMS--ContinuedLODE CLAIMS--Continued

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)  
94 I.D. 453

A lode mining claim located partially on land withdrawn or segregated from mineral location is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land



MINING CLAIMS--ContinuedLODE CLAIMS--Continued

to define the extralateral rights to lodes or veins which apex within the claim.

Amelia Marglin Whitson, 101 IBLA 1 (Jan. 20, 1988)

MARKETABILITY

In order to sustain a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing the mineral deposit can be mined, removed, and marketed at a profit.

In the absence of evidence of sales prior to July 23, 1955, of a common variety deposit of cinders, a discovery must be established on the basis of evidence of marketability at that time, i.e., that the deposit could be mined, removed, and marketed at a profit. Evidence of the existence of a market is insufficient in the absence of evidence of the cost of extracting and processing the cinders for market. Where the evidence discloses that a substantial capital investment in roads and screening/sorting equipment was required to establish a commercially viable operation and that a prudent man would not have made such an investment at that time, a finding of no discovery will be affirmed.

United States v. Aiken Builders Products, 95 IBLA 55 (Dec. 19, 1986)

In order to establish a discovery, the evidence must disclose a deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

MINING CLAIMS--ContinuedMARKETABILITY--Continued

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987)

A petition for reconsideration may be granted only in extraordinary circumstances where good cause is shown therefor. Evidence of the existence of a market for cinders at the time of the withdrawal of such deposits from location in 1955 will not support reconsideration of a decision adjudicating the validity of a mining claim reached after an evidentiary hearing where the existence of such a market was recognized both by the Administrative Law Judge and the Board on review. Where the contest and the appeal were decided on the evidence that cinders from the claims at issue were not marketable, i.e., could not be extracted, removed, and marketed at a profit in 1955, reconsideration is not justified by evidence that there was a market for cinders at the time.

United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70 (Apr. 14, 1988)

MINING CLAIMS--ContinuedMARKETABILITY--Continued

The standard of discovery in a contest of a mining claim is whether minerals have been found in sufficient quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Although the profitability at the time of the contest hearing of a mining claim located for a precious metal (gold) need not be proven, evidence of the projected costs and anticipated revenues of mining the claim is properly considered in determining whether a person of ordinary prudence would be justified in the further investment of his labor and capital.

United States v. New York Mines, Inc., 105 IBLA 171 (Oct. 31, 1988) 95 I.D. 223

A mining claimant who asserts entitlement to consideration of group development of his building stone claims must provide evidence that such claims are susceptible to group development, including identification of the specific claims involved, their relative location, and cost and production figures for such claims.

United States v. Frank & Wanita Melluzzo, 105 IBLA 252 (Nov. 4, 1988)

In order to establish a discovery, the evidence must disclose a mineral deposit such that a man of ordinary prudence would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard has been supplemented by the marketability test, requiring a showing that the mineral deposit can be mined, removed, and marketed at a profit.

United States v. Charles M. Crawford, dba Casi Mining & Mineral Exploration Co., 109 IBLA 264 (June 16, 1989)

MINING CLAIMS--ContinuedMILLSITES

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

In order to determine whether a dependent millsite, which has not been actually used for mining and milling purposes for a significant period of time, has been "occupied" within the meaning of 30 U.S.C. § 42 (1982), a number of factors must be considered, including the validity of any associated unpatented mining claim, the extent of the reserves on any patented claim, the length of time the claim has not been used and the claimant's explanation for the failure to use the claim for mining or milling purposes during this period.

While the existence of pumping stations and other works necessary for use in connection with either mining or milling operations shows a valid appropriation under 30 U.S.C. § 42 (1982), a millsite claim which contains only ditches or pipes for conveyance of water is not a valid appropriation of the land under the millsite law. Prior to the adoption of the Federal Land Policy and Management Act of 1976, such use would establish a right-of-way under 30 U.S.C. § 51 (1970), but is not a qualifying use under 30 U.S.C. § 42 (1982).

Where dependent millsites are claimed as a repository of tailings, it is necessary for the claimant to show that the tailings possess economic value and have a direct relationship with the vein or lode with which the millsites are associated.

While the United States has the authority to limit a millsite claimant to the land actually used for mining and milling purposes, examination as to actual use should generally be limited to each 2-1/2 acre aliquot part of the location.

United States v. Elmer H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

MINING CLAIMS--ContinuedMILLSITES--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite claim abandoned and void without first according the claimant an opportunity to comply with a notice of deficiency.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

Where a millsite claim is located in conjunction with placer mining claims, an applicant for mineral patent must show the millsite claim is located on non-mineral land and is used or occupied for mining operations. 30 U.S.C. § 42(b) (1982).

Pine Valley Builders, Inc., 103 IBLA 384 (Aug. 15, 1988)

The failure to file an annual notice of intention to hold a millsite claim is a curable defect, and BLM may not declare a millsite abandoned and void without first according the claimant an opportunity to comply with the notice of deficiency. Where, owing to misdelivery of BLM's decision providing such opportunity and BLM's misstatement of applicable appeal procedures, claimant may not have been aware of such opportunity, the claimant may be provided with an additional opportunity on remand.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

MINING CLAIMS--ContinuedMILLSITES--Continued

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

MINERAL LANDS

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

PATENT

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

"Protraction survey" or "protraction diagram." A "protraction survey" or "protraction diagram," which consists of lines drawn on a map that follow the public land survey system, but which is not based upon a field survey with monumentation, is not an official survey and therefore the requirement that a placer mineral



MINING CLAIMS--ContinuedPATENT--Continued

patent application be accompanied by a mineral survey of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

A mineral patent applicant bears the burden of showing that he has made a valuable mineral discovery and therefore the patent application must contain sufficient economic and geologic information, such as the description of the discovery points, the workings and the improvements on the claim, and the sampling techniques, to show entitlement and to justify a field examination of the mining claim for the purpose of verifying the information provided.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are not subject to location under the mining laws in the absence of specific statutory or regulatory authorization. Minerals reserved to the United States in a patent to the City of Rifle, Colorado, are not subject to the mining law, since no statute or regulation provides for their disposition under the mining law.

Richard G. Bradley, 89 IBLA 281 (Nov. 8, 1985)

The actual course of a vein may materially deviate from the center line of a lode mining claim without adversely affecting the validity of the mining claim. The originally staked mining claim boundaries need not be adjusted to comport with the actual course of the vein, so long as the mining claim has been located in good faith for mining purposes. No portion of a lode mining claim shall be considered excessive where the statutory dimensions, 1500' by 600', are not exceeded. 30 U.S.C. § 23.

The Department of the Interior has traditionally held that it generally has no duty or reason to require proof that an asserted mineral discovery was upon a vein that had its apex within the boundaries of a lode mining claim as an essential element in establishing the validity of the discovery. This rule will always be applicable when the same mining claimant holds both the mining claims covering the presumed apex

MINING CLAIMS--ContinuedPATENT--Continued

and the mining claims located over the apparent downward dip of the lode.

An allegation that the discovery upon which a lode mining claimant relies is upon a vein that has its apex outside the mining claim for which patent is sought may only be raised by a rival mining claimant asserting extralateral rights. The burden of proof in cases where inquiry is pertinent will be upon the party questioning the applicant's right to patent. In any event, the Department may, in its discretion, decline to adjudicate the issue.

The existence of an apex within a given lode mining claim is not essential to the validity of the lode mining claim, but only to the mining claimant's ability to assert an extralateral right derived from that mining claim.

A lode mining claimant is not limited to appropriate a discovered mineral vein only by locating mining claims along the apparent apex. If there is a true apex with an identifiable descending vein, the mining claimant may at his option rely solely on mining claims on the apex and the corresponding extralateral right to appropriate the vein. Alternatively, the locator may locate mining claims upon the dip of the vein, as well as upon the apex, so long as each mining claim is supported by an exposure of the valuable mineral deposit discovered.

Apex & Extralateral Rights Issues Raised by the Stillwater Mineral Patent, M-36955 (Apr. 18, 1986)

93 I.D. 369

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

MINING CLAIMS--ContinuedPATENT--Continued

Mining claims located on land unavailable for location and entry under the mining laws are null and void ab initio.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988) 95 I.D. 49

Where a mineral patent application has been filed and the mineral claimant has tendered the full purchase price for the claim, a subsequent inquiry as to whether a discovery of a valuable mineral deposit has been shown to exist is properly directed to whether or not the discovery was established by the date of the entry, i.e., no later than the date of issuance of final certificate.

United States v. Norman A. Whittaker (On Reconsideration), 102 IBLA 162 (May 3, 1988)

MINING CLAIMS--ContinuedPATENT--Continued

BLM has a duty to exercise its authority over mining claims to the end that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

Unless a final certificate has been issued, an applicant for a patent to mining claim is not excused under 43 CFR 3833.2-4 from the requirement to file annually an affidavit of assessment work or notice of intention to hold the claim with BLM under 43 U.S.C. § 1744 (1982).

The purchase price for lands covered by an application for mineral patent is not properly submitted until after it is established that no adverse claim or other objection appears. Where the record establishes that there were significant problems with a patent application requiring resolution before purchase money could properly be tendered and final certificate issued, the premature payment and acceptance of mineral patent purchase price neither creates any right to receive certificate of title nor lifts the obligation to comply with the recordation provisions of the Federal Land Policy and Management Act of 1976.

BLM properly rejects a patent application for mining claims which have become invalid because the claimant failed to file a copy of his affidavit of assessment work as required by 43 U.S.C. § 1744 (1982).

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be

MINING CLAIMS--ContinuedPATENT--Continued

excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

When a rival mining claimant files an adverse claim against a mineral patent application, the adverse claimant is required to commence proceedings in a court of competent jurisdiction within 30 days after filing his claim, and failure so to do shall be a waiver of his adverse claims.

Where an application for mineral patent of lode claims is filed and no adverse claim is asserted as required by 30 U.S.C. § 30 (1982), the character of the deposit as lode is conclusively established as to any adverse claimant, and a subsequent challenge by such claimant asserting the claimed deposits are placer is properly rejected.

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

The evidence of title required by regulation at 43 CFR 3862.1-3 in support of a mineral patent application should reflect those documents of record, including notice of location, deeds, and other instruments, purporting to convey or affect title to the claim which the applicant is seeking to patent. The applicant is not required to show his title is superior to all other claims of record, but that he is the successor to possessory title dating back to

MINING CLAIMS--ContinuedPATENT--Continued

the original location of the claim which he seeks to patent.

Geoffrey J. Garcia, Charlotte M. Garcia, 111 IBLA 148 (Sept. 29, 1989)

PLACER CLAIMS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Where mining claimants filed lode claims over a placer location previously made by them on the same land for the same mineral, the lode claims cannot legally be treated as an amendment of the placer claim.

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Failure by mining claimants to timely record the location notice of a placer claim located prior to 1976 resulted in the invalidation of their placer claim



MINING CLAIMS--ContinuedPLACER CLAIMS--Continued

pursuant to provision of sec. 314 of the Federal Land Policy and Management Act of 1976. The filing of assessment affidavits for invalid lode claims located over the placer claim could not operate to avoid the filing requirements of the Act.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

Where the mineral character of land has been contested for lack of bentonite clay of sufficient quality and quantity, the locator of a bentonite placer mining claim must show the mineral character of each 10-acre tract within the claim. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. Where a preponderance of the evidence at hearing establishes an absence of bentonite from several 10-acre tracts claimed, those parts of the contested claims are properly declared invalid.

Jim D. Schlosser et al. v. Verle Pierce et al., 92 IBLA 109 (June 6, 1986) 93 I.D. 211

An association of two locators may locate an association placer claim of 40 acres. 43 CFR 3842.1-2(c). Where evidence of record is incomplete and inconclusive as to whether mining claims were located as association placer claims on behalf of an association of locators, or were located on behalf of a corporation, the BLM decision rejecting the filing of the location notices for the claims will be set aside and the case remanded for further investigation into the exact circumstances of the location of the claims.

Donald D. Hall et al., 95 IBLA 33 (Dec. 15, 1986)

MINING CLAIMS--ContinuedPLACER CLAIMS--Continued

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

A placer mining claim partially located on land patented without a reservation of minerals to the United States is properly declared null and void to the extent it includes such land.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Donald E. Stewart, 104 IBLA 48 (Aug. 23, 1988)

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

John Wright, 112 IBLA 233 (Dec. 20, 1989)

A mining claim for building stone is locatable only under the placer mining laws. A discovery of an uncommon variety of building stone will not establish the validity of a lode mining claim. Although under 30 U.S.C. § 38 (1982), the holding and working of a claim for a period of time equal to the relevant state statute of limitations may be deemed the legal equivalent of proof of location, recording, and transfer of a mining claim, a claim must be rejected where the evidence discloses a claim was not held and worked for the relevant statutory period prior to segregation or withdrawal of the land from location of mining claims.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

## MINING CLAIMS--Continued

### PLAN OF OPERATIONS

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

The surface management regulations at 43 CFR Subpart 3809 implement the mandate of sec. 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. A decision of BLM requiring a mining claimant to operate under an approved plan of operations on the basis that mining operations would cause a cumulative surface disturbance in excess of 5 acres during a calendar year will be affirmed where appellant fails to sustain the burden of showing that 5 acres or less is involved. Although the regulations governing reclamation of disturbed areas permit deferral of reclamation for legitimate mining purposes, un reclaimed surface disturbance from a prior year's operation is properly included in the acreage computation for purposes of determining whether a plan of operations is required.

Differential Energy, Inc., 99 IBLA 225 (Oct. 16, 1987)

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

Approval of mining plans of operations for a cyanide leaching operation may be properly rescinded where the plans are shown to have been approved in error because an assumption was made that an adequate

## MINING CLAIMS--Continued

### PLAN OF OPERATIONS--Continued

supply of water was available which did not in fact exist.

Far West Exploration, Inc., 100 IBLA 306 (Dec. 28, 1987)

Designations as to areas and trails closed and limited to off-road vehicle use made under the authority of Exec. Order No. 11644, amended by Exec. Order No. 11989, and the regulations at 43 CFR Part 8340, are not determinative in reviewing a plan of operations which proposes to use such an area or trail for access to mining claims. Under the regulations, approval of a plan of operations will create an exception allowing use of an off-road vehicle in the area or on the trail.

During the period a wilderness study area is being reviewed so that the Secretary may make his recommendation to the President as to the area's suitability or unsuitability for preservation as wilderness, and until Congress has reached its decision on the matter, BLM is required to manage the lands so as not to impair their suitability for preservation as wilderness. When a plan of operations is rejected by BLM because the proposed activity will impair the area's suitability for preservation as wilderness, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Manville Sales Corp., 102 IBLA 385 (June 17, 1988)

After receiving assertions by local Indians that an area being considered for a mining exploration project was within an area of historical and cultural significance to the Indians, BLM undertook an investigation which included a search of historical records, a class III cultural inventory report, and consultation and joint field examination with the Indians. Based upon the information obtained, BLM determined that the project area was not within a district or site included in or eligible for inclusion in the National Register of Historic Places, and that the mining exploration at the project area would not have an effect on the asserted historical and cultural characteristics of the area. It was proper for BLM to

MINING CLAIMS--Continued

## PLAN OF OPERATIONS--Continued

conclude, based on its findings, that a mining plan of operations could properly be approved in accordance with the Surface Management Regulations in 43 CFR 3809 and sec. 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470(f) (1982).

When recommending that the State of Montana approve a mining plan of operations pursuant to the Surface Management Regulations in 43 CFR 3809 and a memorandum of understanding between BLM and the State of Montana, BLM did not fail to comply with the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1982). The record shows that BLM made a good faith effort to obtain and consider the views of the Indians and determined, based on the record, that the operations set out in the mining plan would not unnecessarily interfere with American Indian religious values and practices and would not prevent the Indians from access to their religious sites. BLM's action was in accord with the policy and requirements of AIRFA.

The Blackfeet Tribe, 103 IBLA 228 (July 26, 1988)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. However, if mining operations on such lands may continue if the operations are occurring in the same manner and degree as on Oct. 21, 1976. A mining plan of operations for claims located after Oct. 21, 1976, even though those claims embrace the same lands covered by different claims located prior to Oct. 21, 1976, cannot be considered to be a continuation of any operations undertaken pursuant to the previous claims and cannot qualify for the less restrictive management standard.

Approval of a mining plan of operations for post-FLPMA mining claims within a wilderness study area may properly be denied when planned road building and blasting impacts could not be rendered substantially

MINING CLAIMS--Continued

## PLAN OF OPERATIONS--Continued

unnoticeable before a final wilderness designation decision is made.

Eugene Mueller, 103 IBLA 308 (Aug. 4, 1988)

A mining claim located in a wilderness study area after Oct. 21, 1976, is subject to provision of 43 U.S.C. § 1782(c) (1982), requiring that the land be managed to prevent impairment of the area for wilderness preservation. Where a mining claim located prior to Oct. 21, 1976, becomes abandoned and void for failure to comply with the recordation provisions of 43 U.S.C. § 1744 (1982), a mining claim located in 1979 covering the same area as the void claim is subject to the nonimpairment standard imposed upon claims located in wilderness study areas after Oct. 21, 1976, by 43 U.S.C. § 1782(c) (1982).

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area when the record supports the conclusion that the road would impair the suitability of the area for preservation as wilderness, contrary to provision of 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

A notice of noncompliance issued to an operator conducting operations under an approved plan of operations for failure to comply with 43 CFR 3802.4-6, will be vacated even though the operator's attitude at different times appeared to BLM to be hostile, abusive, and confrontational where the record shows that the authorized officer was able to make regular compliance investigations of the site, and held telephone conversations with the operator about his mining activities.

An operator conducting operations under an approved plan of operations is required under 43 CFR 3802.4-7 to notify the authorized officer of any suspension of operations within 30 days after such suspension. Where evidence offered on appeal shows that operations are continuing, the lack of activity observed between a 30-day period by itself is insufficient to subject the operator to the notice



MINING CLAIMS--Continued

## PLAN OF OPERATIONS--Continued

requirement of the regulation, and a notice of non-compliance issued for failure to give such notice will not be sustained on appeal.

Mining operations within wilderness study areas must be conducted under properly filed and approved plans of operations. Where a claimant appeals a notice of noncompliance, and on review the record establishes that operations being conducted exceed those authorized by BLM, and described in the plan of operations, the case will be remanded for the filing of a proper plan of operations and the posting of bond to ensure reclamation of the site after operations are completed.

Robert E. Oriskovich, 106 IBLA 93 (Dec. 13, 1988)

Approval of a mining plan of operations will be affirmed where the record indicates that BLM examined and carefully considered the plan of operations, reviewed environmental impacts and properly conditioned approval of the plan on the performance of measures to mitigate or prevent any environmental degradation.

The mere assertion that mining claims were located while the land was closed to mineral entry, unsupported by probative evidence of that fact, provides an insufficient basis for the rejection of a mining plan of operations filed with respect to such claims.

Department of the Navy, 108 IBLA 334 (May 8, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the

MINING CLAIMS--Continued

## PLAN OF OPERATIONS--Continued

decision sought to be reviewed. Even though a group may be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim than a rival claimant. Approval of a mining plan of operations is based upon a determination that such operations will not result in unnecessary or undue degradation of Federal lands, and not on a determination that the party submitting the plan of operations will be able to conduct the proposed operations without trespassing on lands held by others. Therefore, one seeking to prevent operations outlined in a plan of operations submitted to BLM because such operations allegedly would result in trespass should seek such relief in a court of competent jurisdiction.

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

## POSSESSORY RIGHT

Under the provisions of 30 U.S.C. § 38 (1982), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. This provision does not, however, alter other requirements of the mining laws, such as the necessity of a discovery or limitations on acreage which may be taken up in a claim.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

Under the provisions of 30 U.S.C. § 38 (1982), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. "Holding and working" a claim requires more than the mere performance of assessment work, and is only established where claimants have maintained actual, open, and exclusive possession of

MINING CLAIMS--Continued

## POSSESSORY RIGHT--Continued

the claim for the term of the local statute of limitations for adverse possession of real estate. Evidence of exploitation of the mineral deposit by parties other than the claimants without permission from or compensation to the claimants will preclude such a finding.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

A mining claim for building stone is locatable only under the placer mining laws. A discovery of an uncommon variety of building stone will not establish the validity of a lode mining claim. Although under 30 U.S.C. § 38 (1982), the holding and working of a claim for a period of time equal to the relevant state statute of limitations may be deemed the legal equivalent of proof of location, recording, and transfer of a mining claim, a claim must be rejected where the evidence discloses a claim was not held and worked for the relevant statutory period prior to segregation or withdrawal of the land from location of mining claims.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), apply to claims which rely on the provisions of 30 U.S.C. § 38 (1982), to prove location and posting. Where such claims have not been duly recorded, they are a nullity.

The provisions of 30 U.S.C. § 38 (1982), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving recording and posting. Where, however, placer rights are asserted under this statute, such rights must be based on an asserted placer location. Placer rights do not, through the

MINING CLAIMS--Continued

## POSSESSORY RIGHT--Continued

working of this statute, ever attach to lode locations.

Hiram Webb et al., 105 IBLA 290 (Nov. 8, 1988)  
95 I.D. 242

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989)  
96 I.D. 272

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

## POWERSITE LANDS

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and

MINING CLAIMS--ContinuedPOWERSITE LANDS--Continued

(2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 175 86 IBLA 181 (Apr. 30, 1985) 92 I.D.

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 88 IBLA 273 (Sept. 5, 1985)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a powersite is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1982), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

MINING CLAIMS--ContinuedPOWERSITE LANDS--Continued

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be



MINING CLAIMS--Continued

## POWERSITE LANDS--Continued

prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

United States Forest Service v. Walter D. Milender, 155 IOLA 207 (Sept. 12, 1988) 95 I.D. 155

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IOLA 330 (May 2, 1989)

MINING CLAIMS--Continued

## POWERSITE LANDS--Continued

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the relocations of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

E. J. Belding, Jr., Melinda S. Belding, 109 IOLA 198 (June 12, 1989) 96 I.D. 272

## RECORDATION

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IOLA 33 (Jan. 31, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed,

MINING CLAIMS--ContinuedRECORDATION--Continued

for whatever reason, the consequence must be borne by the claimant.

Charlene & Robert Schilling, 87 IBLA 52 (May 23, 1985)

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

Where a mining claim was located in July 1969 and a copy of the official record of the notice of location was not filed with the proper BLM office on or before Oct. 22, 1979, the claim was properly declared abandoned and void pursuant to 43 U.S.C. § 1744(c) (1982).

John W. Finn, 87 IBLA 55 (May 23, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Max Lair, 87 IBLA 106 (May 30, 1985)

BLM may properly declare an unpatented mining claim located prior to 1982 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) where the owner failed to file either evidence of annual assessment work or a notice of intention to hold the claim with BLM on or before Dec. 30, 1982.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed by a certain date under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an affidavit that the

MINING CLAIMS--ContinuedRECORDATION--Continued

document was mailed with another document which was received.

Cascade Energy & Metals Corp., Rex Montis Silver Co., 87 IBLA 113 (May 31, 1985)

Mining claims located prior to July 26, 1866, and recorded in accordance with the rules and customs of local mining districts were subsequently recognized as valid mining claims. Such claims, if they remain unpatented, are subject to the mining claim recordation requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Comstock Tunnel & Drainage Co. & Sutro Tunnel Co., 87 IBLA 132 (June 7, 1985)

When Congress enacted sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), it intended to extinguish those claims for which timely filings were not made. Evidence of subjective intent to hold the claims is not relevant, as the failure to file an affidavit of assessment work or notice of intent to hold in a timely manner, in and of itself, causes the claim to be lost. The statute specifically provides that failure to comply with applicable filing requirements leads automatically to loss of the claim.

For the purposes of 43 CFR 3833.2-1, "timely filing" means being filed within the time period prescribed by law, or received by Jan. 19, after the period prescribed by law, in an envelope bearing a clear postmark affixed by the United States Postal Service bearing a date within the period prescribed by law. When documents submitted for filing have been lost in the mail and thus not received by BLM, such loss must be borne by the claimant.

Paul E. Hammond, 87 IBLA 139 (June 10, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a)(2) (1982), and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4; however, where the claimant provides a map, narrative, or sketch of sufficient detail to identify and locate the claims on the ground, it is improper to declare the claims abandoned and void.

Floyd & Elsie Patrin, 87 IBLA 152 (June 11, 1985)

To comply with 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file his evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of BLM. By regulation 43 CFR 3833.0-5(m), the Department has considered such documents to be timely filed if placed in an envelope postmarked by the United States Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the envelope containing the necessary documentation is postmarked Dec. 31, the claim is properly declared abandoned and void.

J. W. Doyle, 87 IBLA 158 (June 11, 1985)

BLM may not declare an unpatented mining claim abandoned and void for failure to file a notice of intention to hold the claim with both the local recording office and BLM on or before Oct. 22, 1979, where the claimant has already filed within the 3-year period following Oct. 21, 1976, pursuant to sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), thereby initiating the statutory requirement to file prior to Dec. 31 of each year thereafter.

Bernice Sheldon, 87 IBLA 161 (June 11, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of the year following the year in which the claim was located, as required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982).

Golden Triangle Exploration Co., 87 IBLA 191 (June 13, 1985)

Ronald Willden, 97 IBLA 40 (Apr. 23, 1987)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the notice of location was not filed with BLM until after the statutory deadline for filing that document, i.e., 90 days after the date of location, regardless of the fact that it was mailed on the deadline.

Allen B. Clark, 87 IBLA 204 (June 18, 1985)

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

BLM properly declares a mining claim abandoned and void for failure to timely file a certificate of location as required by 43 CFR 3833.1-2 even though the failure to timely file the certificate was attributed to the county's slow return of the document.

August F. Plachta, 87 IBLA 223 (June 18, 1985)



MINING CLAIMS--ContinuedRECORDATION--Continued

A mining claim is properly declared void where a copy of the recorded notice of location is not filed pursuant to 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 in the proper BLM office within 90 days after the date of location.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed results in a conclusive presumption of abandonment of the mining claim.

Howard Gates, 87 IBLA 261 (June 21, 1985)

Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976, was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

BLM may properly declare an unpatented mining claim abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the claimant failed to file either evidence of annual assessment work or a notice of intention to hold the claim for 1982 prior to Dec. 31, 1982.

Ronald H. Vowell et al., 87 IBLA 293 (June 25, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3822.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Karen M. Anderson, 87 IBLA 306 (June 25, 1985)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year.

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed under sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), will not be overcome by an uncorroborated statement that the document was mailed.

Augustine V. Manzanares et al., 87 IBLA 328 (June 26, 1985)

Under the provisions of 43 U.S.C. § 1744 (1982), a mining claimant must file evidence of annual assessment work or a notice of intention to hold each year in a timely manner. Failure to file results in the claim being extinguished, and therefore abandoned and void.

Good Hope Development Co., 87 IBLA 341 (June 26, 1985)

BLM may properly declare an unpatented mining claim abandoned and void for failure to file timely with BLM a copy of the notice of location of the claim, pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Ellis Buschman, 87 IBLA 345 (June 26, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

Failure to file instruments required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 in the proper BLM office within the time prescribed constitutes abandonment of the mining claim.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

BLM may properly declare an unpatented mining claim abandoned and void where a copy of the notice of location of the claim was not received by BLM until after the deadline for filing under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), although it was purportedly mailed prior thereto.

David L. Richards, 88 IBLA 1 (July 28, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982) the owner of an unpatented mining claim located on Federal lands must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Alice R. Kirk, 88 IBLA 4 (June 28, 1985)

A decision declaring an unpatented mining claim located after Oct. 21, 1976, abandoned and void pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), will be affirmed where the affidavit of assessment work due on or before Dec. 30, 1983, although filed prior to

MINING CLAIMS--ContinuedRECORDATION--Continued

Jan. 19, 1984, was not received in an envelope postmarked prior to Dec. 31, 1983, such that the claimant can take advantage of 43 CFR 3833.0-5(m).

David H. Holt, 88 IBLA 36 (July 9, 1985)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where a copy of the notice of location was not filed with BLM within 90 days after the date of location of the claim, in accordance with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

H. B. Layne, Contractor, Inc., 88 IBLA 42 (July 10, 1985)

The owner of an unpatented mining claim located after Oct. 21, 1976, is required to file a copy of the official record of the notice of location or certificate of location of the mining claim with the proper BLM office within 90 days after the date of location. The failure to file the required document shall be deemed conclusively to constitute an abandonment of the mining claim by the owner.

Under 43 CFR 3833.1-2(a) the owner of an unpatented mining claim located after Oct. 21, 1976, must file with BLM within 90 days after the date of location of the claim a copy of the official record of the notice or certificate of location of that claim that was or will be filed under state law. Where a single certificate of location for more than one claim is void under Colorado law as to all claims except the first, if properly described, the first claim of 13 claims included in a single certificate of location should be accepted by BLM for recordation under 43 CFR 3833.1-2(a).

Waldron Enterprises Mining, 88 IBLA 54 (July 16, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

BLM may properly declare an unpatented mining claim located in 1977 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner failed to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim prior to Dec. 31 of each calendar year following the calendar year in which the claim was located.

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

BLM may properly declare an unpatented mining claim filed for recordation in 1979 abandoned and void under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), where the owner fails to file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 31 of calendar years 1980, 1981, and 1982.

Walter E. & Ruth Roman, 88 IBLA 123 (Aug. 1, 1985)

Failure to submit recording fee either with new location or within 30 days of notice of deficiency results in rejection of the attempted recordation.

Arthur A. Gotschall, 88 IBLA 276 (Sept. 5, 1985)

The inference that evidence of assessment work was not timely filed with the Bureau of Land Management (BLM) arising from the absence of such a document from the case file coupled with the presumption that BLM officials have not lost legally significant documents filed with BLM may be overcome by probative evidence to the contrary.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

MINING CLAIMS--ContinuedRECORDATION--Continued

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

When circumstances indicate that additional location notices filed by a locator relate to previously filed claims and are in the nature of amendments to those previously filed claims, proofs of labor filed with reference to those amended location notices may be credited to the original locations.

Fred Chaffin et ux., 89 IBLA 137 (Oct. 1, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

Norman A. Whittaker, 89 IBLA 224 (Oct. 28, 1985)



MINING CLAIMS--ContinuedRECORDATION--Continued

BLM may properly declare an unpatented mining claim abandoned and void if a copy of the notice of location for the claim was not received by BLM until after the close of the filing period specified under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though the document was purportedly mailed prior to the deadline.

Anthony J. Perchetti, 89 IBLA 320 (Nov. 13, 1985)

Sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), requires the owner of a mining claim located on or before Oct. 21, 1976, to file either a notice of intention to hold or evidence of performance of annual assessment work on the claim with BLM on or before Oct. 22, 1979, and prior to Dec. 31 of each year after the initial filing. For a claim located after Oct. 21, 1976, the statute requires the owner to file either of the instruments prior to Dec. 31 of each year following the calendar year the claim was located. These requirements are mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

Thorvald W. Hansen, 90 IBLA 159 (Dec. 30, 1985)

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alamin Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

MINING CLAIMS--ContinuedRECORDATION--Continued

The statutes and regulations governing the description of a mining claim given in a location certificate filed for recordation with BLM do not require that the locator submit information sufficiently accurate for BLM to determine the precise position of the claim on a township plat. Rather, the proper test is whether the claim may, in fact, be found and identified on the ground by following the information in the recorded description.

Arley Taylor, 90 IBLA 313 (Feb. 25, 1986)

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before Dec. 30 of the calendar year following the first filing of such evidence or notice.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

BLM may properly declare an unpatented mining claim located after Oct. 21, 1976, abandoned and void where the copy of the notice of location of the claim was received by BLM 1 day after the deadline for filing, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), even though claimant mailed the document prior to the deadline.

Idaho Mining & Development Co., 92 IBLA 223 (June 23, 1986)

It was error for BLM to reject the recordation of a mining claim, tendered in 1976, upon the subsequent (1983) tentative approval of the lands described therein. Although sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1982), caused all right, title, and interest to the lands to be vested in the State of Alaska upon tentative approval, subject to valid existing rights, that vesting followed the tender of recordation and will not sanction rejection of the tender. Upon the vesting of all right, title, and interest in the State,

MINING CLAIMS--ContinuedRECORDATION--Continued

BLM could no longer adjudicate the validity of a claim located on such lands.

Jennie A. Wasey, Harold E. McNally, 92 IBLA 228 (June 24, 1986)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Memmott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

Where the notice of location for an unpatented millsite is not filed within 90 days of the date of location of the millsite, as required by sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982), the millsite is thereby rendered void and BLM may properly refuse to accept the notice for recordation.

Todd Frederick & Sharon Frederick, 93 IBLA 289 (Sept. 4, 1986)

Where the Bureau of Land Management rejected filings by a mining claimant made on Oct. 22, 1979, of amended location notices for mining claims located in Alaska prior to 1913, which amended notices recited the loss of the original notices of location, rejection of the miner's filing documents was premature where no opportunity was afforded to the claimant to offer secondary proof to establish the asserted foundation of her claims.

Estate of Van Dolah, 94 IBLA 121 (Oct. 9, 1986)

MINING CLAIMS--ContinuedRECORDATION--Continued

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of performance of assessment work on the claim prior to Dec. 31 of each year. Failure to file one of the two instruments within the prescribed period conclusively constitutes an abandonment of the claim. Filing or recording the required document with the county or local recording district does not constitute compliance with the requirement that it be filed with BLM, and an uncorroborated statement that BLM timely received the required document does not overcome the presumption that administrative officials are presumed to have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982) and 43 CFR 3833.1-2 require that a mining claimant file with BLM a description of the location of the mining claim sufficient to locate the claimed lands on the ground. This description shall recite, to the extent possible, the section(s), the approximate location of all or any part of the claim to within a 160-acre quadrant of the section (or sections, if more than one is involved), and the township, range, meridian, and State obtained from an official survey plat or other U.S. Government map showing either the surveyed or protracted U.S. Government grid, whichever is applicable. Where a mining claimant fails to provide such a description with the recordation of the claim, BLM may properly require the filing of such a description within a certain period of time. The failure by the mining claimant to comply with such a request may be considered grounds for declaring the claim abandoned and void in accordance with 43 CFR 3833.4(b).

Joe Ostrenger, Jack Stacy, 94 IBLA 229 (Nov. 10, 1986)



MINING CLAIMS--ContinuedRECORDATION--Continued

There is a rebuttable presumption that administrative officers properly discharge their duties and do not lose or misfile documents. However, when the computer printout listing the documents filed for a mining claim lists an affidavit of assessment work as having been timely filed, that evidence will overcome the presumption that the document was not filed arising from its not being in the case file.

Robert Aumiller, 94 IBLA 315 (Nov. 24, 1986)

BLM is not estopped from declaring an unpatented mining claim located prior to Oct. 21, 1976, abandoned and void for failure to file a copy of an affidavit of assessment work or a notice of intention to hold the claim with BLM on or before Oct. 22, 1979, because BLM has delayed issuing such a declaration for a number of years.

John Robert Maytag, 95 IBLA 128 (Jan. 6, 1987)

The Bureau of Land Management may not reject the filing of a notice of location that was filed before the lands upon which the mining claim was located were the subject of an interim conveyance.

Eskil Anderson, 95 IBLA 253 (Jan. 23, 1987)

BLM may properly require a mineral locator to supply a description of the location of his claim to within a quarter section if this information has not been provided with the filing of a location notice. A locator's failure to properly record a claim may result in a determination that it has been abandoned and is therefore void. However, a locator's failure to file a map or the information required by the regulations is a curable defect, and BLM must notify the claimant and provide an opportunity to supply the information before declaring the claim abandoned and void.

A mining claimant is not required to submit to BLM information sufficiently precise for his claim to be projected onto a township plat. Neither the statute nor the regulations requires a precise map or description of the position of a claim. The test established by

MINING CLAIMS--ContinuedRECORDATION--Continued

statute for the sufficiency of a recorded description is whether the claim may in fact be found and identified on the ground by following the information provided. This is a factual question and unless the description or map is on its face so deficient as to be inadequate as a matter of law, the issue of its sufficiency can be determined only by testing the information in the field.

Because a recorded description and the map filed with BLM are not required to be precise, the uses which may be made of information submitted necessarily depend upon its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks or the legal boundaries of the public land survey, and may permit BLM to determine that the land on which the claim is located has been withdrawn. But a map is useful only to the extent it accurately represents the territory and claim mapped.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

An unpatented mining claim must be deemed abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), where there is no evidence that an instrument of recordation and an initial affidavit of assessment work or notice of intention to hold the claim was filed within the 3-year period following Oct. 21, 1976, by the purported owner of the claim, a predecessor in interest, or an agent.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

The presumption that BLM employees have not lost or misplaced evidence of annual assessment work for an unpatented mining claim, required to be filed on or before Dec. 30, 1981, under sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1982), will not be overcome by proof that BLM mishandled evidence of annual assessment work filed during the 1984 calendar year.

BLM may properly declare an unpatented mining claim abandoned and void under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1982), where the owner fails to timely file with BLM either evidence of annual assessment work or a notice of intention to hold the claim on or before



MINING CLAIMS--ContinuedRECORDATION--Continued

Dec. 30 of any calendar year following the first filing of such evidence or notice.

Not every document filed with BLM from which intent might be inferred is sufficient to meet the statutory and regulatory requirements for notices of intention to hold mining claims. Such a document must be filed as a notice of intent and meet those requirements.

Red Top Mercury Mines, Inc., 96 IBLA 391 (Apr. 14, 1987)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

BLM may properly declare an unpatented mining claim abandoned and void and reject the recordation of affidavits of assessment work where the owner of the claim failed to file a copy of the notice of location for the claim timely with BLM, pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

C. Bert Sanger Trust, 97 IBLA 356 (May 26, 1987)

A locator is not required to submit to BLM a precise description of the position of his claims. The test as to whether a recorded description is sufficient is whether the claim may in fact be found and identified by following the recorded description. Because the information provided to BLM is not required to be precise, the uses which may be made of it necessarily depend upon its relative accuracy. Information provided by a locator may be sufficient to meet the statutory requirement yet be insufficient to support a determination that the claim is null and void for being

MINING CLAIMS--ContinuedRECORDATION--Continued

located on previously patented, withdrawn, or reserved land.

United States Borax & Chemical Co., 98 IBLA 358 (July 31, 1987)

The owner of mining claims located after Oct. 21, 1976, must file copies of the notices of location of the claims with BLM within 90 days of the dates of location of the claims, failing which the claims are properly declared abandoned and void.

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The grace period afforded by 43 CFR 3833.0-5(m) extends only to those documents delivered by the U.S. Postal Service, and does not apply to a document delivered to BLM by a private courier.

Victor Shepherd, 102 IBLA 334 (June 3, 1988)

Where lands covered by mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective. However, when the claims terminate, the withdrawal becomes effective, eo instanti, to the lands covered by the entry, thus

MINING CLAIMS--ContinuedRECORDATION--Continued

closing them to future entries. No further action is required to effect the withdrawal.

The location date for mining claims situated on lands withdrawn from mineral entry by Congress for inclusion in the Wrangell-St. Elias National Park will not relate back to mining claims located prior to the withdrawal, where the previous mining claims were conclusively deemed to be abandoned and void for failure to file copies of proofs of labor or notices of intent to hold as required by sec. 314 of the Federal Land Policy and Management Act of 1976.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

A mining claim located when the land was withdrawn from all forms of appropriation under the public land laws, including the mining laws, is null and void ab initio and BLM properly rejects recordation of such a claim.

James E. Morgan et ux., 104 IBLA 204 (Sept. 12, 1988)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. A copy of a proof of labor with the BLM serial number marked in handwriting, coupled with a statement that the original and the copy were hand delivered to BLM and a written acknowledgement by a BLM employee that the handwriting is her own, are sufficient evidence to establish that the proof of labor was timely filed at the proper BLM office.

Milton E. Kutil, 104 IBLA 396 (Oct. 5, 1988)

A mining claim located in a wilderness study area after Oct. 21, 1976, is subject to provision of 43 U.S.C. § 1782(c) (1982), requiring that the land be managed to prevent impairment of the area for wilderness preservation. Where a mining claim located prior to Oct. 21, 1976, becomes abandoned and void for failure to comply with the recordation provisions of 43 U.S.C. § 1744 (1982), a mining claim located in

MINING CLAIMS--ContinuedRECORDATION--Continued

1979 covering the same area as the void claim is subject to the nonimpairment standard imposed upon claims located in wilderness study areas after Oct. 21, 1976, by 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

Failure to file documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976 causes a mining claim to become abandoned and void.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

The acceptance of a mining claim filing for recordation does not preclude BLM from subsequently declaring the claim to be null and void ab initio upon a finding that the land on which the claim was located was withdrawn from the location of mining claims at the time the claim was located.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on public land must file a notice of intention to hold the mining claim or evidence of annual assessment work on the claim prior to Dec. 31 of each year in the proper office of the Bureau of Land Management. There is no provision for waiver of this mandatory requirement, and where a notice of intention to hold or evidence of assessment work is not timely filed, for whatever reason, the consequence must be borne by the claimant.

The filing of a quitclaim deed relating to a mining claim does not, standing alone, constitute a notice of intention to hold the mining claim. Such a deed merely evidences present ownership, not an intention to hold in the future.

George McGowan, 109 IBLA 1 (May 22, 1989)

MINING CLAIMS--ContinuedRECORDATION--Continued

BLM may properly declare an unpatented mining claim abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

The provisions of 43 CFR 3833.4(b) apply to the filing of supplemental information not specifically called for in 43 U.S.C. § 1744 (1982), and the filing of notices of intention to hold millsites and tunnel site claims. The latitude set out in 43 CFR 3833.4(b) is not available if no annual filing has been made for a lode or placer mining claim, and, in such case, the Department is without authority to allow a 30-day period after notice for a claimant to file the required documents.

David R. Jacques, 109 IBLA 69 (May 30, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed, results in a conclusive presumption of abandonment of the mining claim.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

Where, in response to an inquiry from BLM regarding the exact situs of a mining claim, the claimant submits a professional survey map, along with a copy of a master title plat upon which the location of the claim has been depicted, BLM may rely on those documents to determine the location of the mining claim.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

MINING CLAIMS--ContinuedRECORDATION--Continued

Failure to file in the proper Bureau of Land Management office either evidence of assessment work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed, results in a conclusive presumption of abandonment of the mining claim. Only where a patent application has been filed and a final certificate has been issued will a mining claimant be excused under 43 CFR 3833.2-4 from complying with the filing requirement.

B. J. Londo et al., 109 IBLA 353 (June 23, 1989)

Failure to file in the proper Bureau of Land Management office either evidence of work performed or notice of intention to hold as required by 43 U.S.C. § 1744 (1982), and 43 CFR 3833.2 within the time period prescribed results in a conclusive presumption of abandonment of the mining claim.

Under 43 CFR 3833.0-5(m), a document which is mailed will be considered timely filed provided it bears a clearly dated postmark affixed by the U.S. Postal Service on or before the filing deadline. Where an envelope received by BLM after the Dec. 30 end of the filing period does not bear a postmark date falling within the filing period, the regulation will not apply and the filing is therefore untimely.

Chemical Products Corp., 109 IBLA 357 (June 23, 1989)

An unpatented mining claim is properly declared abandoned and void when a claimant fails to file either evidence of annual assessment work or a notice of intent to hold the claim on or before Dec. 30 of a calendar year.

Doyle C. Cape, 110 IBLA 16 (July 6, 1989)



MINING CLAIMS--ContinuedRECORDATION--Continued

A mining claim located in a powersite at a time when the land was withdrawn from mineral entry is null and void ab initio. While the claimant may establish a new location pursuant to 30 U.S.C. § 38 (1982), by holding and working the claim for a specific period of time while the land is open to location, such a location must be recorded pursuant to sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982). Failure to comply with the recordation provisions shall render any such location abandoned and void.

Steven R. Heady, Bruce G. Heady, 110 IBLA 245 (Aug. 31, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

Use of the term "all contiguous" when appended to a list of mining claims on an affidavit of assessment work, is not sufficient to identify additional claims to comply with sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

BLM has no affirmative obligation to send a notice to remind a mining claimant of the need to make annual filings or to contract a mining claimant to ascertain which claims are intended to be included in the annual filings required by 43 U.S.C. § 1744 (1982).

Where BLM has declared some claims void, but not others, apparently on the basis of identical information provided by the claimant in a group affidavit of annual assessment work, and where it is possible the claims would have been identified from information contained in the affidavit, the decision shall be set aside and remanded for further proceedings consistent

MINING CLAIMS--ContinuedRECORDATION--Continued

with the provisions of sec. 314, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).  
Havilah Gold Co., Inc., 112 IBLA 160 (Dec. 11, 1989)

Because a recorded description and the map of a mining claim filed with BLM along with a copy of the notice of location for the claim are not required to be precise, the uses which may be made of the information submitted necessarily depend on its relative accuracy. If accurate, a map will show the position of a claim in relation to landmarks, other claims, or corners of the public land survey, and may permit BLM to determine that the land on which the claim is located has been patented or withdrawn.

John Wright, 112 IBLA 233 (Dec. 20, 1989)

RELOCATION

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

When BLM declares a mining claim null and void ab initio because the claim was located on land segregated from entry and location under the mining laws, the mining claimant may rebut that finding by showing that he merely amended a valid presegregation location of the claim. However, to do so, he must show that he is the owner of the claim through a regular chain of title. An unsupported allegation that the

MINING CLAIMS--ContinuedRELOCATION--Continued

previous owner "gave" him the claim 24 years ago will not suffice. The United States has the right to invoke the statute of frauds in order to clear title to the public lands.

Hugh B. Fate, Jr., et al., 86 IBLA 215 (Apr. 30, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Rights acquired under a relocation of a mining claim extinguished pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

MINING CLAIMS--ContinuedRELOCATION--Continued

The final ruling of a Government contest of unpatented mining claims which are the subject of amended locations where the claims were declared null and void for lack of discovery of a valuable mineral deposit, which declaration was sustained on appeal, will not be applied to amended locations where the record shows that these amended locations were specifically excluded from the contest action.

Where a mining claimant seeks to amend mining claims and it is subsequently determined the original claims are void for lack of discovery of a valuable mineral, the amendments may not properly be considered amended locations as they cannot relate back to amend underlying locations which are void. Further, the attempted amendments need not be treated as new locations where the record shows they cover substantially the same lands included in previous claims declared void by the Department in prior adjudications, and where it appears the miner's clear intent was to have these filings considered only as amendments to the prior void locations.

Jon Zimmers, 90 IBLA 106 (Dec. 23, 1985)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must

MINING CLAIMS--ContinuedRELOCATION--Continued

be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

Where it appears that a specifically identified mining claim has been recorded twice with BLM by the same locators, the second time as a relocation, a finding that the claim as relocated is abandoned and void for failure to file evidence of assessment work, on the ground the proof of labor filed with BLM referred only to the serial number assigned to the earlier recordation, will be reversed in the absence of evidence the relocation was adverse to the earlier location rather than an amended location which relates back.

Edward E. Ellis, 101 IBLA 272 (Mar. 10, 1988)

A mining claim located in a wilderness study area after Oct. 21, 1976, is subject to provision of 43 U.S.C. § 1782(c) (1982), requiring that the land be managed to prevent impairment of the area for wilderness preservation. Where a mining claim located prior to Oct. 21, 1976, becomes abandoned and void for failure to comply with the recordation provisions of 43 U.S.C. § 1744 (1982), a mining claim located in 1979 covering the same area as the void claim is subject to the nonimpairment standard imposed upon claims located in wilderness study areas after Oct. 21, 1976, by 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

MINING CLAIMS--ContinuedRELOCATION--Continued

An agreement between one of two original locators of a mining claim and a relocater of the claim that the original locator would refrain from filing an affidavit of labor in order to permit the relocation of exactly the same claim did not result in an amendment of the original claim, because the relocation established a new date of claim location and the parties intended to extinguish the original claim and substitute the relocater for the original locators of the claim.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

In order to show that the documents filed subsequent to withdrawal of the land from mineral entry are intended to be amendments of claims located prior to withdrawal, the claimant must establish that the documents he filed were notices of amendment of mineral claims located prior to the withdrawal and that those claims were in good standing on the date of amendment. Without such proof, BLM may properly conclude that the claimant relocated the claims and had no rights by relation back to a prior claim.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)



MINING CLAIMS--ContinuedRELOCATION--Continued

No amended location of a mining claim is possible if the original location was void. Filing an amended notice of location in such circumstances establishes no new rights.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Where the evidence establishes that a mineral location made in 1954 when the land embraced thereby was open to location was not an amendment of an earlier location made in 1947 when the land was closed to mineral entry, a BLM decision holding the 1954 location null and void ab initio will be reversed.

American Colloid Co., 112 IBLA 228 (Dec. 19, 1989)

SPECIAL ACTS

BLM may properly declare a placer mining claim null and void ab initio if the location was not perfected by performance of a condition precedent set forth in the order opening the land in a reclamation withdrawal to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), i.e., execution and recordation of a required stipulation. The mining claimant cannot take advantage of the execution and recordation of the required stipulation in conjunction with a prior lode mining claim allegedly covering the same land when the locator is not the successor in interest with respect to the lode claim.

Red Mountain Mining Co. et al., 85 IBLA 23 (Jan. 30, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to

MINING CLAIMS--ContinuedSPECIAL ACTS--Continued

accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

A mining claim cannot be declared null and void ab initio for the reason that the claimant failed to perfect his location by performing a condition precedent set forth in the order opening the land to mineral entry pursuant to sec. 1 of the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), where that condition precedent is no longer required at the time BLM adjudicates the claim.

Fred G. Welker, 99 IBLA 297 (Oct. 27, 1987)

MINING CLAIMS--Continued

## SPECIAL ACTS--Continued

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154  
(Sept. 6, 1988) 95 I.D. 142

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer

MINING CLAIMS--Continued

## SPECIAL ACTS--Continued

mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

United States Forest Service v. Walter D. Milender, 104 IBLA 207 (Sept. 12, 1988) 95 I.D. 155

MINING CLAIMS--ContinuedSPECIFIC MINERAL(S) INVOLVEDPozzolan

Pozzolan is a nonmetalliferous mineral.

David E. Hoover & Lester F. Whalley, 99 IBLA 291  
(Oct. 26, 1987)SURFACE USES

Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted until the purchase price is paid, to uses reasonably incident to actual mining.

Nothing in the general mining laws invests a locator with the right to initiate occupancy on a mining claim absent a showing that such occupancy is reasonably incident to mining activities.

Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

Under the regulations adopted by the Bureau of Land Management, the authorized officer has no authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

Pursuant to 43 CFR 3809.3-2(d), a notice of non-compliance properly issues upon a determination that a

MINING CLAIMS--ContinuedSURFACE USES--Continued

use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

Bruce W. Crawford et ux., 86 IBLA 350 (May 17, 1985)  
92 I.D. 208

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987)  
94 I.D. 56

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)



MINING CLAIMS--ContinuedSURFACE USES--Continued

Adjudication of a mineral claimant's bond pursuant to 43 U.S.C. § 299 (1982), does not require a formal hearing on the record in conformity to provisions of the Administrative Procedure Act, 5 U.S.C. § 557 (1982). The landowner's rights to notice and an opportunity to be heard concerning the adequacy of the bond furnished to protect his rights as a property owner are safeguarded by the right of appeal to this Board.

A mineral claimant's bond given to enable mining on land patented under the Stock-Raising Homestead Act must be executed by all mineral claimants seeking to re-enter the patented lands.

A mineral claimant's bond must identify the claims sought to be entered by a mineral claimant seeking to re-enter SHRA lands, so as to permit BLM to determine possible damages to crops, surface improvements, and the grazing value of the land within those claims.

Brock Livestock Co., Inc., 101 IBLA 91 (Feb. 2, 1988)

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the mineral claimant's proposed activities on the patented lands.

William & Pearl Hayes, 101 IBLA 110 (Feb. 2, 1988)

When the Government charges in a contest complaint that a mining claim is not being held in good faith for mining purposes and at the hearing the record establishes that the claimants have occupied a cabin on the claim for many years; that the claimants' mining activities are no more than recreational; and that such occupancy is not reasonably incident to the mining activities undertaken, the Administrative Law Judge may

MINING CLAIMS--ContinuedSURFACE USES--Continued

properly conclude that the claim is not being held in good faith for mining purposes.

United States v. Jean M. McMullin, David S. McMullin, 102 IBLA 276 (May 24, 1988)

Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or processing operations, or uses reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989)  
96 I.D. 315

TITLE

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to

MINING CLAIMS--ContinuedTITLE--Continued

have been void ab initio conveys no interest to the grantee.

George R. Schultz et al., 85 IBLA 77 (Feb. 14, 1985)  
92 I.D. 83

The evidence of title required by regulation at 43 CFR 3862.1-3 in support of a mineral patent application should reflect those documents of record, including notice of location, deeds, and other instruments, purporting to convey or affect title to the claim which the applicant is seeking to patent. The applicant is not required to show his title is superior to all other claims of record, but that he is the successor to possessory title dating back to the original location of the claim which he seeks to patent.

Geoffrey J. Garcia, Charlotte M. Garcia, 111 IBLA 148 (Sept. 29, 1989)

TUNNEL SITES

Where one asserts the location of a tunnel site claim and meets the recordation requirements for such a claim, it will be considered a tunnel site claim. However, where the claimant later seeks to "amend" the tunnel site claim into lode claims, such claims must be considered null and void because a tunnel site cannot be amended into lode claims since a tunnel site is not a mining claim, rather it is a right-of-way.

Elsworth & Dolores Loveland, 89 IBLA 205 (Oct. 25, 1985)

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982), the failure of a holder of a mill or tunnel site claim to file an annual notice of intention to hold the site claim is a curable defect. Where BLM fails to notify a mill or tunnel site claimant of a defective filing and to request curative data prior to subsequent filing of annual notices, BLM has effectively waived the defective filing and may not declare the site abandoned and

MINING CLAIMS--ContinuedTUNNEL SITES--Continued

void because of the absence of that document from the file.

Ruth Irene Hackathorn, 94 IBLA 194 (Oct. 30, 1986)

Under 43 CFR 3833.4(b), the failure of a holder of a mill or tunnel site claim to timely file an annual notice of intention to hold the claim is a curable defect. However, this regulation applies only to those documents not specifically required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). The holder of an unpatented placer or lode mining claim cannot rely on this regulation to cure his failure to timely file a notice of intention to hold the mining claim because the requirement to file annual documents for a lode or placer mining claim is a statutory requirement of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982).

Wilbur H. Stark, 98 IBLA 254 (July 7, 1987)

WITHDRAWN LAND

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

A decision declaring a mining claim null and void ab initio will be reversed on appeal where convincing evidence in the record supports a finding that the claim was in fact located prior to withdrawal of the land from mining.

Ray L. Virg-in, 84 IBLA 347 (Jan. 17, 1985)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

Where mining claims are located after Oct. 21, 1976, a copy of the notices of location must be filed with the proper office of the Bureau of Land Management within 90 days after the dates of such locations, failing which, the claims must be deemed conclusively to have been abandoned. If, subsequently, the locator files new notices of location bearing a later date, that constitutes a relocation of the former claims, and the new claims date from such relocation. If in the interim between the abandonment of the original claims and the date of their relocation the land is withdrawn, the relocated claims are null and void ab initio.

Mac A. Stevens (On Reconsideration), 85 IBLA 33 (Jan. 31, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal is null and void ab initio.

Maynard C. Campbell, Jr., 85 IBLA 295 (Mar. 13, 1985)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

A millsite claim located on land which has been segregated from mineral location is properly declared null and void ab initio.

Clara Holloway Sampson, 87 IBLA 143 (June 10, 1985)

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of



MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Dilley, 87 IBLA 150 (June 11, 1985)

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

Mining claims located on lands closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required preliminary to a decision holding that such claims are invalid. The fact of such claims being void does not depend upon any act or decision of an administrative official.

Walter MacEwen, Malcolm MacEwen, 87 IBLA 210 (June 18, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extra-lateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Where the official records of the Department disclose that mining claims were located on land withdrawn from location under the mining law, those claims are null and void ab initio, and the fact that the withdrawal was overlooked in an earlier proceeding does not bar the Department from later asserting the withdrawal.

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a powersite is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1982), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

John R. & Vickie L. Malone, 89 IBLA 341 (Nov. 13, 1985)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

BLM may properly declare a mining claim located on lands withdrawn and closed to mineral entry null and void ab initio.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal is null and void ab initio.

Mining claims located on lands which are closed to mineral entry are null and void from their inception as a matter of law, and no property rights are created thereby. Therefore, no contest proceeding, notice, or hearing is required prior to a decision holding that such claims are invalid.

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

Where land was withdrawn from location under the mining law and mining claimants subsequently located lode claims upon the same land, the lode claims were null and void ab initio.

Paul Vaillant et al., 90 IBLA 249 (Jan. 30, 1986)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was withdrawn from mineral entry by Secretarial order of Dec. 14, 1904, issued pursuant to sec. 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388.

James W. Bullard, Harold W. Bullard, 91 IBLA 391 (Apr. 29, 1986)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George E. Krier, 92 IBLA 101 (May 30, 1986)

A mining or millsite claim located on land previously withdrawn from mineral entry is null and void ab initio.

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim must be treated as a new location as to the rights of an intervenor.

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Mining claims located on lands closed to mineral entry are null and void ab initio as a matter of law, and no property rights are created. Therefore, no contest proceeding or hearing is required prior to a decision holding a claim null and void ab initio.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively the location made while the lands were segregated from mineral entry.

Harold E. De Roux, 94 IBLA 350 (Nov. 28, 1986)



MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

Where appellant provides support for a contention that the refiling of a mining claim location made subsequent to a withdrawal of the land upon which the claim was located was an amended location of a prior claim embracing the same land rather than a new relocation, a decision declaring the claim null and void will be remanded for further review. In determining the sufficiency of an amended claim, the original location notice and the amended notice must be construed together, and if sufficient when so construed, the location will be valid.

Estate of Van Dolah, 95 IBLA 132 (Jan. 7, 1987)

A mining claim located on land withdrawn or reserved from mineral location is null and void ab initio; however, the side and end lines of a lode claim may extend onto withdrawn land for the purpose of defining extralateral rights to veins or lodes which apex within the claim, although the locator does not thereby acquire rights to use the surface of the withdrawn land and may or may not acquire rights to the minerals underneath.

Outline Oil Corp., Mrs. I. M. Feldkamp, Jr., 95 IBLA 255 (Jan. 23, 1987)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

If lands have been withdrawn from mineral entry the owner of a mining claim must demonstrate that the claims he owns were located prior to withdrawal. In doing so he must also demonstrate a chain of title running from the locator to him.

Mascot Mining, Inc., 95 IBLA 328 (Jan. 30, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, and the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or non-metalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

the mineral in place had been exposed prior to the date of withdrawal.

United States v. Harlan H. Foresyth et al., 100 IBLA 185 (Dec. 8, 1987) 94 I.D. 453

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.

Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

An amended location notice generally relates back to the date of the original location notice. A location notice cannot be considered an amended location, so as to relate back to a location which predates a withdrawal, to the extent such location notice describes new land not embraced in the original location.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

the lands as provided in sec. 2627.3(c)(1)(iii), (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Public Land Order No. 5251 continued in effect the withdrawal of lands in Alaska from location and entry under the mining laws that was initiated by the earlier Public Land Order No. 5179.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Harges Mining Co., 102 IBLA 169 (May 3, 1988)

Mining claims located on lands that are withdrawn from mineral entry both by an act of Congress and by a duly published public land order on the date of location are properly declared null and void ab initio.

Where lands covered by mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective. However, when the claims terminate, the withdrawal becomes effective, eo instanti, to the lands covered by the entry, thus closing them to future entries. No further action is required to effect the withdrawal.

The location date for mining claims situated on lands withdrawn from mineral entry by Congress for inclusion in the Wrangell-St. Elias National Park will

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

not relate back to mining claims located prior to the withdrawal, where the previous mining claims were conclusively deemed to be abandoned and void for failure to file copies of proofs of labor or notices of intent to hold as required by sec. 314 of the Federal Land Policy and Management Act of 1976.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

Where land is withdrawn from location and entry under the mining laws subsequent to the location of a mining claim, claimant must establish the discovery of a valuable mineral deposit at the time of the withdrawal.

United States of America v. Joseph R. Henri & Aletha Henri (On Judicial Remand), 104 IBLA 93 (Aug. 31, 1988)

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for



MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154  
(Sept. 6, 1988) 95 I.D. 142

A mining claim located when the land was withdrawn from all forms of appropriation under the public land laws, including the mining laws, is null and void ab initio and BLM properly rejects recordation of such a claim.

James E. Morgan et ux., 104 IBLA 204 (Sept. 12, 1988)

Placer mining claims are properly declared null and void ab initio if, at the time of location, the land is withdrawn from prospecting, location, entry, and purchase under the mining laws of the United States.

Revocation of a withdrawal of lands subsequent to the date of location of placer mining claims will not retroactively validate those claims.

Kathryn J. Story, 104 IBLA 313 (Sept. 15, 1988)

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 4601-18(c) (1982), cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

If any part of a lode mining claim is located on lands open to mineral entry, it cannot be deemed null

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

and void ab initio because a portion of the claim is also on withdrawn lands.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

Larry Morales, William Thomas, & T. & M. Land & Cattle Co. v. John A. Baudendistel, Brian A. Baudendistel, & John H. Sankot, 105 IBLA 211 (Nov. 2, 1988)

An attempt to relocate a mining claim upon lands withdrawn from the operation of the mining law in 1972 by a State of Alaska land selection was ineffective to establish a relocated claim upon the segregated land.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

Mining claims located on land which has been segregated from appropriation under the mining laws by publication in the Federal Register of a notice of classification under the Classification and Multiple Use Act of 1964 are properly declared null and void ab initio. A subsequent modification or revocation of the classification order will not retroactively validate locations made while the lands were segregated from mineral entry.

Pluess-Stauffer (California), Inc., 106 IBLA 198  
(Dec. 21, 1988)

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wexselblatt, 106 IBLA 304 (Jan. 5, 1989)

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection

MINING CLAIMS--ContinuedWITHDRAWN LAND--Continued

when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority, and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

BLM properly declares a placer mining claim null and void ab initio where it was located on land subject to a license for a power project under a powersite withdrawal and the land had not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982).

John Wright, 112 IBLA 233 (Dec. 20, 1989)

MINING CLAIMS RIGHTS RESTORATION ACT

Lands covered by a preliminary permit of a prospective licensee for a power project, which was issued by the Federal Energy Regulatory Commission and is in its initial term, are not open to mineral location. Mining claims located on such land are

MINING CLAIMS RIGHTS RESTORATION ACT--Continued

void ab initio unless the land has been restored to mineral entry.

Bill Hallock, Walt Hallock, 87 IBLA 126 (June 5, 1985)

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 88 IBLA 273 (Sept. 5, 1985)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a powersite is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1982), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)



MINING CLAIMS RIGHTS RESTORATION ACT--Continued

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon

MINING CLAIMS RIGHTS RESTORATION ACT--Continued

reclamation of the mined land to the same condition as it was found prior to mining.

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a powersite withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

United States Forest Service v. Walter D. Milender, 155 IBLA 207 (Sept. 12, 1988) 95 I.D. 155

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

BLM properly declares a placer mining claim null and void ab initio where it was located on land subject to a license for a power project under a powersite withdrawal and the land had not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982).

John Wright, 112 IBLA 233 (Dec. 20, 1989)

# NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

## GENERALLY--Continued

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969  
(See also Environmental Policy Act--if included in this Index.)

## GENERALLY

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tied to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Humpy Mountain Timber Sale, 88 IBLA 7 (June 28, 1985)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tied to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society. Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case files remanded for supplementation of the EA to consider the alternative which it failed to study.

State of Wyoming Game & Fish Comm'n, 91 IBLA 364 (Apr. 24, 1986)

A finding that the grant of a right-of-way does not constitute a major Federal action significantly affecting the quality of the human environment will be upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant or, if there is significant impact, that changes in the project have sufficiently minimized such impact.

California Wilderness Coalition et al., 98 IBLA 314 (July 30, 1987)

## ENVIRONMENTAL STATEMENTS

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Append. 2, § 2.8.

Analysis of the impact of a proposed action under the National Environmental Policy Act, as amended, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or environmental impact statement in connection with issuance of a noncompetitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

Sierra Club Legal Defense Fund, Inc. Natural Resources Defense Council, Inc. California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued  
ENVIRONMENTAL STATEMENTS--Continued

Execution of a cooperative agreement between the Bureau of Land Management and a state wildlife management agency providing for study and preservation of wildlife habitat does not ordinarily constitute a proposal for major Federal action which may adversely affect the human environment requiring preparation of an environmental impact statement.

Lane County Audubon Society et al., 85 IBLA 185  
(Feb. 26, 1985)

Where, subsequent to the issuance of a final programmatic EIS detailing a specific level of clearing activities, it is determined to substantially increase the amount of acreage to be cleared, far beyond any level reasonably foreseeable by a review of the EIS, BLM must either issue a new EIS or a supplemental EIS prior to implementing the increased level of clearing.

In re Upper Floras Timber Sale et al., 86 IBLA 296  
(May 13, 1985)

Where review of the environmental consequences of a proposed action discloses gaps in relevant information or scientific uncertainty, the gaps or uncertainty must be disclosed. If the information relative to adverse impacts is essential to a reasoned choice among alternatives and the cost of obtaining it is exorbitant, the agency shall weigh the need for the action against the risk and severity of possible adverse impacts. Such consideration shall include a worst-case analysis and an indication of the probability or improbability of its occurrence.

The presence of gaps in information regarding the adverse effects of a herbicide on the human environment may stem from lack of knowledge as well as from a dispute among experts regarding the inferences to be drawn from existing information.

Federal action within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982), may be found not only where an agency proposes to undertake an action itself, but also where an agency makes a decision which permits action by another party. Ordinarily some overt act by a federal

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued  
ENVIRONMENTAL STATEMENTS--Continued

agency in support of another party's action is required to establish federal action. Federal action may be found where there is federal funding as well as federal approval of action conducted by state and local authorities on the public domain.

Idaho Natural Resources Legal Foundation, 88 IBLA 201  
(Aug. 28, 1985)

A finding that proposed gold dredging operations will not have a significant impact on the human environment, and that no environmental impact statement is required, is affirmed on appeal where the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize the environmental impact. Such a determination is not overcome by a stated difference of opinion, unsupported by independent proof, alleging the environmental analysis is erroneous.

Public opposition to a proposed project alone is an insufficient basis to require preparation of an environmental impact statement; such opposition does not make a proposed action controversial within the meaning of 40 CFR 1508.27(b)(4).

Tulkisarmute Native Community Council et al., 88 IBLA  
210 (Aug. 28, 1985)

A 1979 environmental impact statement describing both site-specific and aggregate effects of coal mining does not require supplementation in the absence of significant change in the proposed operation.

Natural Resources Defense Council, Inc., et al.  
(Petitioners) v. Office of Surface Mining Reclamation  
& Enforcement (Respondent), Atlantics Richfield Co.  
(Intervenor), State of Colorado (Intervenor), 89 IBLA  
1 (Sept. 27, 1985) 92 I.D. 389



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued  
ENVIRONMENTAL STATEMENTS--Continued

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35  
 96 IBLA 19 (Feb. 26, 1987)

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

A regional environmental impact statement is required in only two instances: (1) when there is a comprehensive Federal plan for the development of a region, and (2) when various Federal actions in a region have cumulative or synergistic impacts on a region.

Southwest Resource Council, 96 IBLA 105 (Mar. 10, 1987)  
 94 I.D. 56

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued  
ENVIRONMENTAL STATEMENTS--Continued

When BLM has adopted a staged leasing program and notifies a potential geothermal lessee that all post-lease plans for exploration and development are subject to site-specific environmental review, and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

Union Oil Co. of California, 99 IBLA 95 (Sept. 17, 1987)

Union Oil Co. of California et al., 102 IBLA 187  
 (May 5, 1988)

The Board of Land Appeals has jurisdiction to review a decision by BLM not to prepare a supplemental environmental impact statement pursuant to 40 CFR 1502.9(c)(1)(ii).

BLM's decision not to prepare a supplemental environmental impact statement in accordance with 40 CFR 1502.9(c)(1)(ii), will be affirmed if such decision is reasonable, depending upon such factors as (1) the environmental significance of the new information, (2) the probable accuracy of the information, (3) the degree of care with which it considered the information and evaluated its impact, and (4) the degree to which BLM supported its decision not to supplement with a statement of explanation or additional data.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

The Board will affirm BLM's approval of an application for permit to drill based on an environmental impact statement when the record reveals that BLM carefully considered all factors relevant to its decision and appellants fail to present compelling reasons for reversal or modification. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club et al., 104 IBLA 76 (Aug. 29, 1988)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--ContinuedENVIRONMENTAL STATEMENTS--Continued

The DOI Manual requires consideration of a checklist of factors before issuing a categorical exclusion of actions from the NEPA process. These criteria are: (a) The action or group of actions will have no significant effect on the quality of the human environment; and (b) the action or group of actions will not involve unresolved conflicts concerning alternative uses of available resources.

Where the renewals of Friant Unit contracts, being nondiscretionary, do not constitute major Federal actions. Therefore, there is no requirement to do an environmental assessment, or other impact analysis as a threshold to the renewals. Furthermore, the mere renewal of the contracts with no substitute changes in the terms, would not change the status quo.

Renewal of Friant Unit Contracts, M-36961 (Nov. 10, 289 1988)

The Board will dismiss an appeal from a determination that a proposed action will not have a significant impact on the quality of the human environment where the record establishes a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. One who challenges the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal when the determination is reasonable and supported by the record on appeal.

In the Matter of the Appeal of Grand Lake Ass'n. Inc., 8 OHA 1 (Dec. 20, 1988)

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--ContinuedENVIRONMENTAL STATEMENTS--Continued

premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The Sierra Club, Inc., et al., 107 IBLA 96 (Feb. 1, 1989)

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS



NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--ContinuedENVIRONMENTAL STATEMENTS--Continued

announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

A determination that approval of a permit for a coal preparation plant will not have a significant impact on groundwater, based on an environmental assessment, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been undertaken; relevant environmental concerns have been identified; and the final determination is reasonable in light of the environmental analysis.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--ContinuedENVIRONMENTAL STATEMENTS--Continued

involve any unnecessary or undue degradation to WSAs which would require preparation of an environmental impact statement.

An environmental assessment of a proposed road improvement project will be set aside and remanded where the scope of the project is segmented and the assessment fails to consider the impact of connected actions which are interdependent parts of a larger action and depend on the larger action for their justification.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

NATIONAL HISTORIC PRESERVATION ACTGENERALLY

Where the record establishes that a specific site has historic significance for Native history or culture and the site meets the criteria set forth at 45 CFR 2653.5, this site is properly conveyed to the appropriate, Native Regional Corporation pursuant to 43 U.S.C. § 1613(h)(1) (1982).

United States Forest Service, 101 IBLA 38 (Jan. 26, 1988)

After receiving assertions by local Indians that an area being considered for a mining exploration project was within an area of historical and cultural significance to the Indians, BLM undertook an investigation which included a search of historical records, a class III cultural inventory report, and consultation and joint field examination with the Indians. Based upon the information obtained, BLM determined that the project area was not within a district or site included in or eligible for inclusion in the National Register of Historic Places, and that the mining exploration at the project area would not have an effect on the asserted historical and cultural characteristics of the area. It was proper for BLM to conclude, based on its findings, that a mining plan of operations could properly be approved in accordance with the Surface Management Regulations in 43 CFR 3809 and sec. 106 of the National Historic



NATIONAL HISTORIC PRESERVATION ACT--ContinuedGENERALLY--Continued

Preservation Act, as amended, 16 U.S.C. § 470(f) (1982).

The Blackfeet Tribe, 103 IBLA 228 (July 26, 1988)

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decisionmaking process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect such resources. Whatever procedures the NHPA may require BLM to follow in reviewing a homesite application, the fact they must be undertaken neither invalidates the application nor necessitates its rejection.

United States of America v. Vernard E. Jones. Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

NATIONAL HISTORIC PRESERVATION ACT--ContinuedGENERALLY--Continued

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of all sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

APPLICABILITY

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

NATIONAL PARK SERVICELANDUse

Even though the elements necessary for invoking estoppel against the United States may be present, estoppel will not lie if to do so would interfere with underlying Government policies or unduly undermine the enforcement of a particular law or regulation. An approval of an assignment of grazing rights within the Capitol Reef National Park to a party not an heir of the holder of those rights on Dec. 18, 1971, contrary to the express provisions of 16 U.S.C. § 273b (1982), may be rescinded after a lapse of 9 years, as the Bureau of Land Management had no authority to approve such assignment, and to do so would be directly contrary to the intent of Congress when establishing the park.

Jeffery Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (June 17, 1988)

NAVAL PETROLEUM RESERVES

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. The Department is not required by Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), to recover title to land conveyed to Atkasook Corp. in 1977, where a Native allotment application describing such land had been finally rejected prior to conveyance on the basis that the land was within the National Petroleum Reserve-Alaska.

Kate Aiken et al., 102 IBLA 131 (Apr. 21, 1988)

NAVIGABLE WATERS

A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted. Whether a lake in Montana is navigable for purposes of determining title to the lakebed depends upon whether there is evidence to show the lake had been used or was susceptible of being used

NAVIGABLE WATERS--Continued

as a highway for commerce at the time Statehood was conferred upon Montana in 1889.

State of Montana, 88 IBLA 382 (Sept. 27, 1985)

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985) 92 I.D. 620

Federal law must be applied by BLM to determine whether a lake is navigable in fact when determining ownership of a lakebed for purposes of issuance of a Federal oil and gas lease. In such a case, navigability depends upon whether there is evidence to show the lake had been used or was susceptible of being used as a highway for commerce at the time Statehood was conferred in 1889. An offer by the State to prove the lake was used as a waterway for commercial logging raises a sufficient issue of fact to require a fact-finding hearing to determine navigability of the lake at statehood.

State of Montana, 91 IBLA 104 (Mar. 14, 1986)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

NAVIGABLE WATERS--Continued

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

NOTICE

## GENERALLY

All persons dealing with the government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Michael R. Ware, 88 IBLA 111 (July 31, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

Constructive service of a Bureau of Land Management decision sent by certified mail to an applicant's address of record is made when the post office returns the decision to the Bureau stamped "unclaimed." The 30-day period for filing a notice of appeal from the decision commences at that time, and is not tolled, extended, or the constructive service vitiated, by actual receipt of the decision thereafter.

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

NOTICE--Continued

## GENERALLY--Continued

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

F. Howard Walsh, Jr., Mae Lamar Davis & Newton Lamar, 93 IBLA 297 (Sept. 9, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)



NOTICE--Continued

## GENERALLY--Continued

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

J-O'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the

NOTICE--Continued

## GENERALLY--Continued

complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

BLM may properly require an applicant under sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), to publish a notice of his application, in accordance with 43 CFR 2541.5, regardless of any prior publication pursuant to state law in connection with a tax sale of the property sought.

Robert E. Richards, 98 IBLA 153 (June 23, 1987)

NOTICE--ContinuedGENERALLY--Continued

BLM may not properly reject a plan of operations for a mining claim on the basis that the claim was declared null and void in 1956 when the claimant failed to answer the contest complaint, where the record shows that BLM failed to serve a copy of the complaint on the person who actually owned the claim at the time the complaint was issued, and, thus, the contest was a nullity.

Patsy A. Brings, 98 IBLA 385 (Aug. 5, 1987)

BLM may reject a simultaneous oil and gas lease offer pursuant to 43 CFR 3112.5-1(c) where the applicant fails to return three executed copies of the lease offer and stipulations within the time provided in the BLM notice. Here, it was error to reject a purportedly untimely submission of lease offer forms and stipulations because BLM effectively extended the time for such submission.

Vicki D. Graham, 102 IBLA 38 (Apr. 11, 1988)

Where BLM served notice of noncompliance and assessment on an individual other than the lessee's designated representative for service yet the lessee gained knowledge of the notice and timely sought review, the lessee was not prejudiced by BLM's failure to serve a designated representative.

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

The Bureau of Land Management properly dismissed a protest which challenged a completed action and was filed nearly 3 years after the party filing the protest received notice of the action.

Devon Energy Corp., 104 IBLA 90 (Aug. 31, 1988)

NOTICE--ContinuedGENERALLY--Continued

An assessment made pursuant to 43 CFR 3163.3(a) (1986), may be levied where an operator has failed to comply with a written order or instruction of an authorized BLM officer.

Dalport Oil Corp., 104 IBLA 327 (Sept. 21, 1988)

The Department has long followed the rule that transmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing that the Postal Service failed to follow its established procedures in delivering the decision.

Rick Lee McMullen, Jr., 105 IBLA 80 (Oct. 19, 1988)

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

NOTICE--ContinuedGENERALLY--Continued

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililland, 108 IBLA 144 (Apr. 5, 1989)

"Last address of record." In the processing of an application for assignment of a coal lease the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

NOTICE--ContinuedGENERALLY--Continued

One who holds an oil and gas lease from the United States is presumed to know the applicable laws and regulations, and the United States cannot be bound or estopped by acts of its officers or agents, if doing so would undermine the correct enforcement of a particular law or regulation. Reliance upon erroneous or incomplete information provided by a BLM employee will not overcome a clear regulatory requirement.

Stephen G. Moore, 111 IBLA 326 (Oct. 31, 1989)

CONSTRUCTIVE NOTICE

Where an authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication, that person will be deemed to have received the communication if it was delivered to his last address of record on file in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. 43 CFR 1810.2.

Lawrence E. Welsh, Jr., 91 IBLA 324 (Apr. 17, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)



NOTICE--ContinuedCONSTRUCTIVE NOTICE--Continued

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

J-Q'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

The Department has long followed the rule that transmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing that the Postal Service failed to follow its established procedures in delivering the decision.

Rick Lee McMullen, Jr., 105 IBLA 80 (Oct. 19, 1988)

The Department has long followed the rule that transmission of a document to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. However, a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

David Robertson, 107 IBLA 114 (Feb. 2, 1989)

Where an oil and gas lessee has entered into a seller's representative agreement and designated the operator of the lease as its representative for the tender of royalty payments to the United States, service of documents relating to those payments on the operator constitutes effective service upon the lessee.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989)<sup>96 I.D. 367</sup>

OFFICERS AND EMPLOYEES

(See also Federal Employees & Officers--if included in this Index.)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

OIL AND GASGENERALLY

BLM may properly rely on public hearings conducted, and adopt past and future decisions rendered by a State board with respect to oil and gas conservation within Indian lands where BLM retains the ultimate jurisdiction to approve such decisions and, in fact, exercises an independent review function prior to such adoption.

Assiniboine & Sioux Tribes, 85 IBLA 39 (Feb. 5, 1985)

PIPELINESGenerally

The Minerals Management Service correctly concluded that 30 CFR 202.150(a) precludes the deduction of line losses attributed to the transportation of royalty oil from the wellhead of an Outer Continental Shelf oil and gas lease to an onshore delivery point, as a transportation allowance.

Conoco, Inc., 103 IBLA 108 (July 19, 1988)

Rights-of-Ways

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land

OIL AND GAS--Continued

## PIPELINES--Continued

Rights-of-Ways--Continued

Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

OIL AND GAS--Continued

## PIPELINES--Continued

Rights-of-Ways--Continued

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

OIL AND GAS--ContinuedPIPELINES--ContinuedRights-of-Ways--Continued

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act--if included in this Index.)

GENERALLY

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985)  
92 I.D. 37

The prohibition against the issuance of new leases created by sec. 2(a)(2)(A) of the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A), extends to all mineral leases issued under the Mineral Leasing Act, not merely to coal leases.

Sec. 2(a)(2)(A) of the Mineral Leasing Act of 1920, M-36951 (Feb. 12, 1985)  
92 I.D. 537

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

Where an oil and gas operator is assessed a penalty for failure to obtain approval from the Bureau of Land Management under 43 CFR 3162.3-3 prior to constructing a flowline in connection with an oil and gas well, but the penalty is assessed under a subsection of the regulations which deals with an entirely different regulation, and it appears that there is no assessment prescribed for violation of 43 CFR 3162.3-3, the decision will be reversed.

Wintershall Oil & Gas Corp., 85 IBLA 101 (Feb. 14, 1985)

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) where the applicant uses as its address the address of another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)



# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to remove oil contaminated soil from the well site pursuant to 43 CFR 3162.5-1, and assess liquidated damages for failure to timely comply with that notice by removing all contaminated soil. However, the assessment for noncompliance will be reduced to a one-time, rather than a successive, charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

Willard Pease Oil & Gas Co., 89 IBLA 236 (Oct. 29, 1985)

# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with the regulations in 43 CFR Part 3100, applicable lease terms or written order or instruction of an authorized officer is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage to the lessor from the specific incident of noncompliance. Thus, a correctly issued notice of incident of noncompliance will be the basis for the levy of a minimum assessment regardless of good faith effort to abate the condition after issuance.

Mont Rouge, Inc., 90 IBLA 3 (Nov. 27, 1985)

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

Under 43 CFR 3108.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and the deficiency is nominal, the lease shall not automatically have terminated unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

An assignment of an oil and gas lease is ineffective until the proposed assignment has been approved by BLM. 30 U.S.C. § 187a (1982). Until such time as the assignment is approved, the party designated as the party responsible for payment of lease rentals on the lease to be assigned remains responsible for rental payments.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3.

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Under the regulations in 43 CFR Subpart 3162 (Requirements for Lessees and Operators), an oil and gas lease operator is responsible for the submission of reports on the quantity of gas or oil produced.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

BLM may properly determine the failure to submit timely a monthly report of operations is an incident of noncompliance under 43 CFR 3162.4-3.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, R. B. Allsup, 92 IBLA 197 (June 12, 1986)

When the only reasonable construction of 43 CFR 3162.3-2(a), as evidenced by prior regulations, the rule-making process, and other regulations, is that "water shut-off" is a subsequent well operation requiring prior approval, an operator under an oil and gas lease cannot rely on the mispunctuation of the regulation as an ambiguity which can excuse failure to

# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

obtain approval prior to commencing with water shut-off activities.

Bolack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

Where BLM issues an incident of noncompliance for failure of the transporter to "isolate the sales tank" during the "sales phase" and assesses the oil and gas lease operator \$250 in accordance with 43 CFR 3163.3(j), and on appeal the record indicates the transporter had not transferred any oil or engaged in any activity which would violate the integrity of the storage system, the "sales phase" had not commenced and the violations and assessments will be overturned.

Petrostates Resources, Inc., 93 IBLA 165 (Aug. 12, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to timely file a notice of production start-up may be vacated by this Board, in view of the suspension of that regulation and a change in Departmental policy that such assessments should automatically be levied.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits on a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the

# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

appellant fails to provide any countervailing evidence to show the decision is in error.

Mapco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)

The number of bids received at a sale of competitive oil and gas leases on any parcel does not necessarily represent an accurate test of fair market value, as bidders may consider other factors in making their bids.

I. K. Rosen, 94 IBLA 202 (Nov. 4, 1986)

Automatic assessments for failure to file timely production reports pursuant to 43 CFR 3163.3(h) are vacated in deference to a later issued BLM Instruction Memorandum suspending enforcement of 43 CFR 3163.3(h).

Davis Oil Co., 94 IBLA 325 (Nov. 24, 1986)

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)



OIL AND GAS LEASES--ContinuedGENERALLY--Continued

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

An oil and gas lease offer for less than 640 acres or one full section, whichever is larger, is properly rejected, unless the offer includes all available lands within a section and there are no contiguous lands available for lease.

New Mexico & Arizona Land Co., 96 IBLA 178 (Mar. 18, 1987)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

notice. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

The Board will affirm BLM's dismissal of a protest of an oil and gas lease sale where the protestant's allegations that the winning bidder enjoyed an unfair advantage and that BLM was remiss in its duties in conducting the sale are unsupported by the record.

Chevron U.S.A. Inc., 96 IBLA 272 (Mar. 26, 1987)

# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to facilities located on private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to submit site facility diagrams of facilities located on such private leases under 43 CFR 3162.7-4(d)(1) to aid BLM in accounting for production and royalties allocated to the Federal and/or Indian leases.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

Where the evidence establishes that a high bidder predicated his bid at a competitive oil and gas lease sale upon a BLM memorandum which erroneously reported the amount of funds held in an escrow account attributable to the subject parcel, the Board will rescind the offer and direct BLM to refund appellant's bid deposit.

C. Craig Folsom, 101 IBLA 198 (Feb. 22, 1988)

# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

Where the evidence establishes that a well drilled under an allotted Indian lands lease is no longer capable of producing oil or gas in paying quantities, and an opportunity has been afforded to the Indian lessor to obtain another operator but attempts to obtain one have been unsuccessful, a decision by BLM permitting the original operator to plug and abandon the well will be affirmed.

Everett Hall, 101 IBLA 362 (Mar. 28, 1988)

BLM may reject a simultaneous oil and gas lease offer pursuant to 43 CFR 3112.5-1(c) where the applicant fails to return three executed copies of the lease offer and stipulations within the time provided in the BLM notice. Here, it was error to reject a purportedly untimely submission of lease offer forms and stipulations because BLM effectively extended the time for such submission.

Vicki D. Graham, 102 IBLA 38 (Apr. 11, 1988)

When regulations governing late or erroneous reporting of sales and royalty remittance have been amended to allow reduction of charges for such errors to bring them more in line with the additional administrative costs incurred, absent intervening rights or countervailing public policy reasons, the Board will set aside and remand pending cases on appeal if application of the new regulations will benefit the affected parties.

Conoco, Inc., et al., 102 IBLA 230 (May 18, 1988)

Where BLM served notice of noncompliance and assessment on an individual other than the lessee's designated representative for service yet the lessee gained knowledge of the notice and timely sought review, the lessee was not prejudiced by BLM's failure to serve a designated representative.

BLM may properly issue a notice of incidents of noncompliance requiring a unit operator to file a form designating a successor operator and assess

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

liquidated damages under 43 CFR 3163.3(a) (1984), for failure to comply with that notice.

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

There is no time limit within which a decision to reject a lease offer or to issue a lease must be made. An oil and gas lease offer filed for lands which are subsequently designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. As the filing of an oil and gas lease offer creates no entitlement to a lease, a BLM decision rejecting oil and gas lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

An application for suspension of an Outer Continental Shelf oil and gas lease made pursuant to Minerals Management Service Release No. 86-12 will properly be denied if the party seeking the suspension is not the designated operator and the application has not been filed by all lessees. Suspensions pursuant to that release were to be granted only upon a showing of both an inability to obtain the necessary NPDES permits during the period between June 30, 1984, and July 2, 1986, and a showing that the delay in exploration activities was a result of this inability. The application required that the applicant attest to this fact, and absent a joint attestation by all lessees, the only party able to attest to these facts is the operator.

Chevron U.S.A., Inc., 103 IBLA 296 (Aug. 3, 1988)

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan approved by the authorized officer as required by regulation at 43 CFR 3162.3-4(a). Where the record on appeal from a decision requiring an operator to replug a well discloses a material issue of fact regarding whether the well was properly plugged, the case is properly referred for an evidentiary hearing pursuant to 43 CFR 4.415.

Coleman Oil & Gas, Inc., 104 IBLA 363 (Sept. 27, 1988)

The signing of an over-the-counter oil and gas lease offer by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease and creates a binding contract.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

A lessee is required to put into marketable condition, if economically feasible, all oil and gas produced from leased lands and conduct operations in such a manner as to prevent avoidable loss of oil and gas. Thus, a lessee is liable for royalty payments on oil or gas lost or wasted from a lease when such loss or waste is due to the lessee's negligence or failure to comply with any regulation or properly issued order or citation.

The Department has the authority to issue NTLs for Federal or Indian leases. NTL-4A specifically governs the calculation of royalties or compensation for oil and gas which is lost by an operator. Under NTL-4A, oil well gas may not be vented or flared unless that activity is approved in writing by an authorized officer. For oil wells completed on or after Jan. 1, 1980, the effective date of NTL-4A, an application must be filed and approval received for any venting or flaring of gas beyond the initial 30-day or otherwise authorized test period. Produced gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the full value of the gas avoidably lost,



OIL AND GAS LEASES--ContinuedGENERALLY--Continued

or the allocated portion thereof attributable to the lease.

Lomax Exploration Co., 105 IBLA 1 (Oct. 7, 1988)

Under the over-the-counter noncompetitive leasing system, no offer to lease public domain lands could include acquired lands. Where it was subsequently shown that acquired lands were leased pursuant to a lease offer for public domain lands, the lease is properly canceled as to the acquired lands.

Atlantic Richfield Co., 105 IBLA 61 (Oct. 17, 1988)

When BLM issues a noncompetitive lease upon an over-the-counter offer, BLM is required to mail a copy of the executed lease to the offeror. A decision that an oil and gas lease has terminated by operation of law for failure to pay timely the annual rental on the first anniversary date will be reversed if BLM did not mail or deliver the lease to the offeror's last address of record.

Carolyn L. Shogrin, 105 IBLA 231 (Nov. 4, 1988)

An NTL-4A requiring compensation for the venting or flaring of natural gas in the absence of authorization was promulgated in the exercise of the Department's statutory and regulatory authority to require lessees to market oil and gas produced from the lease if economically feasible. A decision of BLM conclusively presuming that gas flared without prior authorization was avoidably lost, will be set aside and the case remanded to determine whether in fact it was economically feasible to market the gas at the time it was flared where BLM has since changed its interpretation of NTL-4A to give the lessee notice and an opportunity to show the gas was not marketable at the time and where it appears this interpretation is consistent with the intent of the underlying statutory and regulatory authority.

Ladd Petroleum Corp., Patrick Petroleum Corp. of Michigan, 107 IBLA 5 (Jan. 24, 1989)

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

The Department has the authority to issue NTL's for Federal leases. NTL-4A governs compensation for oil and gas which is lost by an operator. Unless specifically allowed by the provisions of NTL-4A, venting or flaring of oil well gas must be approved in writing by an authorized officer. Unless it can be shown that it was uneconomic to recover the gas at the time it was vented or flared, gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

When oil and gas leases are issued pursuant and subject to all regulations of the Secretary "now or hereafter in force," the Secretary is not limited to enforcing only those regulations in effect at the time of lease execution.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Where BLM issues a decision conclusively presuming that gas flared on a Federal oil and gas lease without prior authorization from BLM was "avoidably lost," and where BLM subsequently issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas flared from Federal and Indian leases is "avoidably lost" and directing BLM to review all prior determinations of avoidable loss to conform them to the new policy, BLM's decision will be vacated and the case remanded for further review under the terms of the new policy.

Willard Pease Oil & Gas Co., 108 IBLA 108 (Mar. 29, 1989)

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be

OIL AND GAS LEASES--ContinuedGENERALLY--Continued

set aside and the case remanded for issuance of leases of the five areas without the stipulation.

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

BLM may properly require a reasonable contingency plan for salinity control in stipulations to a permit for surface discharge of water pursuant to the provisions of Notice to Lessees and Operators of Federal and Indian Oil and Gas Lessees (NTL-2B) and the regulations in 43 CFR 3162.5-1 which control disposition of water produced during production of oil and gas on Federal lands. NTL-2B sets forth requirements for handling, storage, or disposal of water produced from oil and gas wells with which all lessees must comply. Methods of water disposal used by a lessee must be approved by BLM.

A. G. Andrikopoulos Oil & Gas Properties, 108 IBLA 369 (May 17, 1989)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material



# OIL AND GAS LEASES--Continued

## GENERALLY--Continued

respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforeseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

For onshore operations, the congressional grant of authority, found at 30 U.S.C. § 226(j) (1982), authorizes the Secretary to order the combining of units and participating areas for conservation reasons. Included in this grant is the authority to approve any unit plan he may deem necessary or proper to secure the proper protection of the public interest, to mandate unitization, and to prescribe a plan which shall adequately protect the rights of all parties in interest, including the United States, and this authority may be exercised over the objections of working and royalty interest owners affected by that action. Having the authority to create, expand, or contract units and participating areas, the Secretary also has the concomitant authority to order such joinder as is necessary to implement that decision.

Under 30 U.S.C. § 226(j) (1982), as a condition precedent to establishing, expanding, or contracting a unit, the "reasonableness" of the proposal must be considered by the Department.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

# OIL AND GAS LEASES--Continued

## ACQUIRED LANDS LEASES

Under 43 CFR 3101.2-3 (1980), a noncompetitive over-the-counter offer for acquired lands which included a request for less than an entire tract of acquired land was required to describe the land by course and distance between the successive angle points of the boundary of the tract sought and was further required to be accompanied by a map showing the land sought. Where an offer did not so describe the land, it could afford the offeror no priority.

John R. Chitwood III, 84 IBLA 300 (Jan. 2, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam O. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority



OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

A noncompetitive oil and gas lease offer for acquired land not within the area of the public land surveys may properly describe the land in the offer by metes and bounds giving the course and distance between successive angle points on the boundary of the tract.

An oil and gas lease offer is considered to be an offer to lease any and all lands described therein. The fact that part of a tract of land described in an oil and gas lease offer is unavailable for leasing does not ordinarily require rejection of the entire lease offer.

Bruce Anderson, 85 IBLA 270 (Mar. 6, 1985)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

Noncompetitive oil and gas lease offers for acquired lands in Michigan were rejected because the mineral estates were reserved when the land was conveyed to the United States. Where the offeror subsequently fails on appeal, to provide any evidence to show rights to the oil and gas deposits have since vested in the United States by operation of law, the lease offers were properly rejected.

PMG, 90 IBLA 60 (Dec. 10, 1985)

OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 384 (Apr. 28, 1986)

Under 43 CFR 3111.2-2, a noncompetitive over-the-counter offer for acquired lands which includes a request for less than an entire tract of acquired land is, inter alia, required to describe the land by course and distance between the successive angle points of the boundary of the tract sought. Where such a description is not provided, the offer affords no priority and is properly rejected by BLM.

Burk Properties, 93 IBLA 117 (July 28, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Zoe C. Schluter, 93 IBLA 314 (Sept. 11, 1986)

OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing, in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

A detailed reevaluation to determine if the lands are within a known geologic structure is a statutory prerequisite to leasing acquired military lands within the City of Corpus Christi, Texas, pursuant to the Act of Oct. 19, 1984, P.L. 98-529, 98 Stat. 2697. A non-competitive lease may not be issued for such lands where there is no indication in the record that such an evaluation has been performed.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

An applicant seeking a noncompetitive oil and gas lease for acquired lands who challenges a determination by BLM that land is within a known geological structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. The Board of Land Appeals may properly consider data compiled both before and after a KGS determination in reviewing the merits of such determination.

Carolyn J. McCutchin, 99 IBLA 29 (Aug. 26, 1987)

BLM may properly designate lands as within a known geologic structure (KGS) of a producing oil or gas field even though such lands are not underlain by a dome or anticline. Lands underlain by stratigraphic traps of oil or gas may properly be designated as KGS lands, and such lands may be leased only by competitive bidding.

Carol Ann Hoffman, 100 IBLA 139 (Dec. 2, 1987)

Where an offeror for a noncompetitive oil and gas lease for acquired lands within an approved unit agreement fails to submit, within a specified time period established by BLM, evidence either that the offeror has entered into the agreement, or that the unit operator does not object to lease issuance without unit joinder in accordance with 43 CFR 3101.3-1, or to request an extension of time for compliance, and where there are intervening rights, BLM may properly reject the offer.

Mary Nan Spear, 101 IBLA 13 (Jan. 22, 1988)

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting

OIL AND GAS LEASES--ContinuedACQUIRED LANDS LEASES--Continued

of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close, is properly subject to rejection. The incorrect description renders the face of the offer subject to corrections absent which a lease could not issue.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

When approving applications for permit to drill on an existing acquired lands oil and gas lease, BLM may properly impose seasonal restriction stipulations on drilling in order to protect an endangered species of bird and, at the behest of the surface managing agency, to preclude drilling during the flood season.

Prado Petroleum Co., 103 IBLA 247 (July 26, 1988)

A party making an over-the-counter oil and gas lease offer for land not surveyed under the rectangular system of the public land survey is required to provide a description of the land for which the offer is made as stated in 43 CFR 3111.2-2(b). It is the responsibility of the Bureau of Land Management to satisfy itself that the land described in the offer is available for leasing and that the lease may properly be issued.

Beard Oil Co., 103 IBLA 251 (July 27, 1988)



## OIL AND GAS LEASES--Continued

### ACQUIRED LANDS LEASES--Continued

A person challenging a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Sinclair Oil Corp., 106 IBLA 33 (Dec. 7, 1988)

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the acquiring agency, in accordance with 43 CFR 311.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiguity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

Beard Oil Co., 111 IBLA 191 (Oct. 10, 1989)

### ACREAGE LIMITATIONS

Under 43 CFR 3110.1-3(a), the minimum size for a noncompetitive oil and gas lease offer in Alaska is 2,560 acres or four full contiguous sections, which ever is larger, where the lands are within an approved protracted survey, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease. An offer is properly rejected where it is established that the lands applied for, although comprising four full contiguous sections, together comprised less than 2,560

## OIL AND GAS LEASES--Continued

### ACREAGE LIMITATIONS--Continued

acres, and that contiguous lands were also available for leasing.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

### APPLICATIONS

#### Generally

Where an applicant for a simultaneous oil and gas lease fails to designate a state prefix on the automated application form, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (1983), and the applicant is properly assessed a service charge of \$75 per application form and all other filing fees are returned.

Denver Resources, Inc., 84 IBLA 327 (Jan. 8, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. K. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

A successful applicant in a simultaneous oil and gas lease drawing does not acquire a vested right to obtain an oil and gas lease but merely obtains the right for priority of consideration should a noncompetitive oil and gas lease ultimately issue.

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Ruckstuhl, 85 IBLA 69 (Feb. 11, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geologic structure of a producing oil or gas field, that portion within the known geologic structure may only be leased by competitive bidding. Where lands are determined to be within a known geologic structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8305141, 85 IBLA 307 (Mar. 19, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where appellant fails to show error, the determination will be upheld.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Where an individual whose application has been drawn with first priority for an oil and gas lease in the simultaneous leasing program fails to submit the signed lease offers or the advance rentals within 30 days of notice by BLM, the application must be rejected, regardless of any justification which the applicant may provide for his failure to timely transmit the documents.

F. Miles Ezell, Sr., 86 IBLA 146 (Apr. 25, 1985)

It is proper for BLM to reject a simultaneous oil and gas lease application submitted with uncollectible filing fees. 43 CFR 3112.2-2(c) (1982) disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition precedent to further participation in the simultaneous leasing program.

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) where the applicant uses as its address the address of another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

A simultaneously filed oil and gas lease application which attains priority must be rejected where the applicant fails to submit the executed lease agreement and first year's advance rental payment within 30 days after receipt of notice to do so, even where the applicant has experienced a business disaster during that period.

Joann S. Bennett, 87 IBLA 121 (May 31, 1985)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Ronald Valmonte, 87 IBLA 197 (June 14, 1985)

Angelo J. Sparacino, 91 IBLA 265 (Apr. 9, 1986)

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official approved form without additions, omissions, or other changes or advertising. An oil and gas lease offer is properly rejected if the two sides of the approved form are copied on separate sheets of paper.

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose that he received the assistance of any person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program.

James D. Buerge, 88 IBLA 168 (Aug. 19, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

A Feb. 1983 BLM decision barring an oil and gas lease applicant from further participation in simultaneous drawings pending the payment of an alleged debt was not effective during the time the applicant had to appeal and the timely filing of a notice of appeal suspended the effect of the decision. Thereafter, when the second drawee for a parcel in the Mar. 1983 drawing protests the selection of the barred applicant as first drawee, the protest is properly dismissed where the effect of the Board's ruling on the appeal was to remove the bar to participation.

Jewell Scott, Jr., 88 IBLA 307 (Sept. 17, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), provides that lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. If lands are determined to be within a known geologic structure prior to issuance of a lease, BLM has no authority to exercise discretion in the matter and must reject a noncompetitive oil and gas lease offer for such lands.

Lavada S. Jackson, 89 IBLA 167 (Oct. 10, 1985)

Under 43 CFR 3112.0-5 and 3112.2-4, any simultaneous oil and gas applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program must indicate on the lease application the name of the party or filing service that provided assistance. Where an applicant admits that he has received such assistance and has not so indicated on Part B of his application, his application is properly rejected.

Robert R. Shrode, 89 IBLA 186 (Oct. 17, 1985)

Where amended regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers along with instructions of a general secretarial nature as to how the application should be completed, has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Glen E. McCuistion, 89 IBLA 228 (Oct. 29, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer must be rejected where the lands are determined to be within a known geologic structure after the simultaneous oil and gas lease drawing, but before the lease is issued.

A noncompetitive oil and gas lease applicant who challenges the determination that land is within a known geologic structure bears the burden of proving by a preponderance of the evidence that the determination is erroneous.

Edward W. Eidt, 89 IBLA 270 (Nov. 8, 1985)

Land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding. Where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show the determination is in error by a preponderance of the evidence considered.

Thomas Bohr, Jr., William Collister, 89 IBLA 384 (Nov. 22, 1985)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms and first year's rental are not submitted within 30 days of notice to do so as required by 43 CFR 3112.4-1(a) (1982).

Where the evidence establishes that various associations have been formed by a filing service for the purpose of submitting simultaneous oil and gas lease applications with operating control of these associations vested only in officers or employees of the filing service, use of the home address of the president of the filing service as the address of the

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

association violates the provisions of 43 CFR 3112.2-1(d) (1982).

Where the evidence indicates that an agent who signed an application on behalf of an association did not, in fact, have an agency relationship with the applicant, such application must be rejected.

Failure to comply with regulations aimed at policing the simultaneous oil and gas leasing system to prevent abuse constitutes a substantive violation under Conway v. Watt, 717 F.2d 512 (10th Cir. 1983), and requires rejection of all applications so defective.

Satellite 8211104 et al., 89 IBLA 388 (Nov. 22, 1985)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

David R. Wilson, 90 IBLA 7 (Nov. 27, 1985)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence received.

Leonard Luning, 90 IBLA 12 (Dec. 3, 1985)

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field must show by



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

a preponderance of the evidence that the determination is in error.

Charles J. Frank, 90 IBLA 33 (Dec. 10, 1985)

Sherbourne Partnership, 90 IBLA 130 (Dec. 24, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where the land in a noncompetitive lease offer is determined at any time prior to issuance of the lease to be within a known geologic structure of a producing oil or gas field, that land may only be leased by competitive bidding. A noncompetitive oil and gas lease offer for such land must be rejected. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8303147, 90 IBLA 103 (Dec. 23, 1985)

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

Carolyn J. McCutchin, 93 IBLA 134 (July 29, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

Ralph E. Peterson, 94 IBLA 340 (Nov. 26, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

Where a first-drawn applicant for an oil and gas lease in the simultaneous leasing program fails to submit signed lease offers within 30 days of notice by BLM, the application is properly rejected.

Lawrence E. Welsh, Jr., 91 IBLA 324 (Apr. 17, 1986)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Semanko, 91 IBLA 348 (Apr. 22, 1986)

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

Gladys Walta, 91 IBLA 352 (Apr. 23, 1986)

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James B. Dodson, 94 IBLA 69 (Sept. 29, 1986)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 135 (Oct. 21, 1986)

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

J-O'B Operating Co., 97 IBLA 89 (Apr. 28, 1987)

The drawing of an oil and gas lease applicant's name under the simultaneous leasing system does not create any property or contract right in the party whose name is drawn, but merely establishes the priority for purposes of filing a noncompetitive lease offer. It creates only a right to have the application fairly considered under the applicable statutory criteria. Timely return of executed lease forms and payment of the first year's rental constitutes an offer to lease. An offer to lease is not accepted until the lease forms are signed by the authorized BLM officer.

Shaw Resources, Inc., et al., 98 IBLA 96 (June 12, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a KGS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

Departmental regulation 43 CFR 3111.1-1(a), requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.1-1(f).

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

Where a simultaneous noncompetitive oil and gas lease applicant violates 43 CFR 3112.2-1(b) by using a post office box rented and exclusively controlled by officers of a lease filing service, it has failed to submit an application that would qualify it to receive an oil and gas lease, and administrative cancellation of a lease issued pursuant to the application is required.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

An oil and gas lease application must be rejected pursuant to 43 CFR 3112.2-1(d) (1982) (currently 43 CFR 3112.2-1(b)), where the applicant used a mailing address which was used by another person or entity in the business of providing assistance to those participating in the simultaneous oil and gas leasing system and the record shows that the same mailing address was used as a common address for collecting applicants' and others' mail as a mail-forwarding box within the access and control of the person involved in providing the assistance in oil and gas lease filings.

Big Horn Partnership & Red Desert Partnership, 100 IBLA 20 (Nov. 19, 1987)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of the notice as required by 43 CFR 3112.6-1(a). Delivery of such documents after regular business hours on the date they were required to have been filed does not constitute compliance with the 30-day requirement in 43 CFR 3112.6-1(a) where the documents are deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day.

Santa Fe Energy Co., 102 IBLA 393 (June 21, 1988)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

A junior over-the-counter noncompetitive oil and gas lease offer is properly rejected when the lands have been leased to a senior offeror, and the junior offeror fails to show valid reasons why the senior offer is defective.

Joe N. Johnson, 103 IBLA 5 (June 22, 1988)

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.1(f).

Bernard Silver, Frederick L. Smith, 104 IBLA 20 (Aug. 17, 1988)

A person challenging a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Jack J. Grynberg, 104 IBLA 51 (Aug. 24, 1988)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

noncompetitive lease application for such lands must be rejected.

Lawrence A. Egan, 104 IBLA 57 (Aug. 25, 1988)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil and gas field. 43 CFR 3110.3(a).

A BLM decision rejecting a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, will be set aside and remanded, where the record on appeal contains no supporting geological data to substantiate the basis for the determination.

Petex, Inc., 104 IBLA 72 (Aug. 26, 1988)

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

The Bureau of Land Management properly rejected over-the-counter oil and gas lease offers for lands previously included in expired leases since, under 43 CFR 3112.1-1 (1986), such lands were subject to the filing of noncompetitive lease offers only in accordance with simultaneous filing procedures.

Floyd J. Lauber, 105 IBLA 234 (Nov. 4, 1988)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

43 CFR 3112.2-2 places all applicants on notice that the \$75 application processing fee for noncompetitive lease offers made pursuant to simultaneous drawing will not be refunded. Where a portion of appellants' lease offer was properly rejected due to partial inclusion of the tract within a known geologic structure, BLM did not commit error in its refusal to refund appellants' \$75 application processing fee.

John R. Stamper, BHP Petroleum (Americas), Inc.,  
110 IBLA 130 (Aug. 9, 1989)

Land which is not within a special tar sand area is subject to noncompetitive oil and gas leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), only if the land had been offered for competitive bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was received or the highest bid received was less than the national minimum acceptable bid.

A parcel which was listed for competitive sale but was later withdrawn by BLM is not subject to noncompetitive leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), until the land has been made available for oral bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was submitted or the highest bid received was less than the national minimum acceptable bid.

Robert G. Volkmann, 112 IBLA 5 (Nov. 8, 1989)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedGenerally--Continued

Filing a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on terms available at the time the lease offer was made. The Secretary may suspend a portion of a lease offer pending additional KGS study.

Ervin R. Wepplo, 112 IBLA 69 (Nov. 22, 1989)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Terra Resources, Inc., 112 IBLA 94 (Nov. 28, 1989)

Amendments

The Board will affirm a BLM decision rejecting a noncompetitive over-the-counter oil and gas lease offer for public domain lands where the lands cannot be embraced within a 6-mile-square area or an area not exceeding six surveyed sections in length and width, as required by 43 CFR 3110.1-3(b).

Doanld J. Kunkle, Ingrid M. Kunkle, 94 IBLA 212  
(Nov. 5, 1986)

Attorneys-in-Fact or Agents

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedAttorneys-in-Fact or Agents--Continued

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.E.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

Where the evidence establishes that various associations have been formed by a filing service for the purpose of submitting simultaneous oil and gas lease applications with operating control of these associations vested only in officers or employees of the filing service, use of the home address of the president of the filing service as the address of the association violates the provisions of 43 CFR 3112.2-1(d) (1982).

Where the evidence indicates that an agent who signed an application on behalf of an association did not, in fact, have an agency relationship with the applicant, such application must be rejected.

BLM may properly reject a noncompetitive oil and gas lease offer where an attorney-in-fact signed the offer and submitted the first year's rental and the power of attorney did not prohibit the attorney-in-fact from filing offers on behalf of other participants, as required by 43 CFR 3112.4-1(b) (1982).

Satellite 8211104 et al., 89 IBLA 388 (Nov. 22, 1985)

After a simultaneous oil and gas lease drawing the failure of a first-drawn applicant to file an offer in accordance with 43 CFR 3112.6-1 necessitates rejection of the offer. Where the offer form has been signed by one who is designated as an attorney-in-fact for the offeror, either a copy of the document granting the power of attorney must be submitted or a reference must

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedAttorneys-in-Fact or Agents--Continued

be made to a qualifications file where such authorization has previously been filed, together with a statement the power of attorney is still valid, over the personal handwritten signature, in ink, of the prospective lessee.

Sabine Corp., 90 IBLA 327 (Feb. 26, 1986)

BLM may properly reject a noncompetitive oil and gas lease offer signed by someone other than the offeror when it is not rendered in a manner to reveal the name of the signatory and the relationship between the offeror and signatory, in accordance with 43 CFR 3102.4. However, the BLM decision will be reversed where the evidence establishes that the offeror actually signed the offer forms.

Ethel K. Brauns, 94 IBLA 64 (Sept. 29, 1986)

Where it is clear from the record that the person signing a simultaneous oil and gas lease offer on behalf of a corporation is a duly authorized corporate officer, compliance is established with the requirements of the regulation at 43 CFR 3102.4 notwithstanding the fact the signing officer was identified as an attorney-in-fact.

Lear Petroleum Exploration, Inc., 95 IBLA 304 (Jan. 30, 1987)

The attorney-in-fact regulation, 43 CFR 3112.6-1(b)(1), prohibits an attorney-in-fact from executing a lease offer under the simultaneous leasing procedures, 43 CFR Subpart 3112, for one party when he is authorized to file offers as an attorney-in-fact for another. It specifically requires that a power-of-attorney document expressly prohibit the attorney-in-fact from filing offers on behalf of any other participant. If a person whose power of attorney contains the prohibition signs a lease offer on behalf



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedAttorneys-in-Fact or Agents--Continued

of another party, he violates the terms of his power of attorney.

Texaco Inc., 95 IBLA 397 (Feb. 24, 1987)

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

Under the regulation at 43 CFR 3112.2-1(b), an applicant is required to use its own personal or business address and use of the address of any other party which is in the filing service business is prohibited. A decision rejecting an application filed by a filing service in its own name as applicant on the ground a filing service address was used will be reversed as unsupported by the regulation.

Research Investment Co., Inc., 102 IBLA 151 (Apr. 27, 1988)

A noncompetitive oil and gas lease offer signed by the offeror may not be rejected by BLM pursuant to 43 CFR 3102.4, where the offeror's name on the accompanying stipulations is signed by the offeror's agent.

Florence Bern, 103 IBLA 260 (July 27, 1988)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedAttorneys-in-Fact or Agents--Continued

Pursuant to 43 CFR 3112.6-1(b), the power of attorney authorizing an attorney-in-fact to sign lease offers submitted under the simultaneous filing procedures must prohibit the attorney-in-fact from filing offers on behalf of any other offeror. Where the power of attorney fails to include such a prohibition, the offer is properly rejected.

Peggy A. Yates, 103 IBLA 341 (Aug. 9, 1988)

If an Automated Simultaneous Oil and Gas Lease Application, Part B, is designed by someone other than the applicant, the application must show the relationship of the signatory to the applicant. An application which fails to disclose the relationship between the applicant and the signatory must be rejected. The fact that it had been accepted for selection and subsequently selected for priority does not alter this requirement.

Robert Klabzuba, 104 IBLA 255 (Sept. 12, 1988)

Description

Under 43 CFR 3101.2-3 (1980), a noncompetitive over-the-counter offer for acquired lands which included a request for less than an entire tract of acquired land was required to describe the land by course and distance between the successive angle points of the boundary of the tract sought and was further required to be accompanied by a map showing the land sought. Where an offer did not so describe the land, it could afford the offeror no priority.

John R. Chitwood III, 84 IBLA 300 (Jan. 2, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDescription--Continued

An oil and gas lease offer for surveyed land or land within a protracted survey must describe the land by legal subdivision, section, township, and range. An offer which fails to describe the land by section is defective and, therefore, properly rejected.

Isabelle C. Chang, 86 IBLA 129 (Apr. 19, 1985)

BLM is not required to alter, modify, or correct an over-the-counter oil and gas lease offer in order to provide an acceptable description of land to be entered on the offer.

John T. Bukant, 88 IBLA 51 (July 15, 1985)

Under 43 CFR 3101.1-4(a) (1981), the failure to designate a meridian is not a fatal defect in the land description in a noncompetitive oil and gas lease offer for acquired lands, where the description, on its face, uniquely delimits the land requested and BLM does not have to go outside the offer form itself to determine exactly what lands the offer describes.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

The purpose of 43 CFR 3103.2-3 (1980) was to require an oil and gas lease offer or to provide a description in the offer which is sufficient on its face to delimit the lands in the offer. Where the land described is surveyed, the addition of qualifying phrases to describe subdivisions does not make the description improper. However, where excluded lands are not specifically identified in the offer, the offer will be construed to encompass all the land described.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDescription--Continued

Under 43 CFR 3111.2-2, a noncompetitive over-the-counter offer for acquired lands which includes a request for less than an entire tract of acquired land is, *inter alia*, required to describe the land by course and distance between the successive angle points of the boundary of the tract sought. Where such a description is not provided, the offer affords no priority and is properly rejected by BLM.

Burk Properties, 93 IBLA 117 (July 28, 1986)

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

An offer to lease a tract of land for oil and gas constitutes an offer to lease any and all of the lands described therein which are available for leasing. Where a lease offer describes a tract of acquired land outside the area of the public land surveys, part of which is unavailable for leasing, a decision of BLM requiring an oil and gas lease offeror to provide a metes and bounds description of those lands available for leasing will be affirmed. The filing of such a description does not alter the priority of the lease offer.

Bruce Anderson, 101 IBLA 366 (Mar. 29, 1988)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDescription--Continued

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close, is properly subject to rejection. The incorrect description renders the face of the offer subject to corrections absent which a lease could not issue.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the acquiring agency, in accordance with 43 CFR 3111.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiguity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDescription--Continued

States, the offer affords no priority in the face of the conflicting present interest lease offer.

Beard Oil Co., 111 IBLA 191 (Oct. 10, 1989)

Drawings

Where a decision of a state office prematurely rejects an oil and gas lease offer before the expiration of a period of time granted to the offeror to submit various documents, the rejection effectively suspends the running of the time for compliance, and where an appeal is timely taken from such a premature rejection and the documents in question are submitted during the pendency of the appeal, the submission will be considered timely.

American Petrofina Co. of Texas, 85 IBLA 104 (Feb. 14, 1985)

Where a filing service is retained to file oil and gas lease applications on behalf of a partnership and instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981) forbidding multiple filings by a partnership for the same parcel.

Christopher F. Clancy, 85 IBLA 174 (Feb. 26, 1985)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Satellite 8305136, 85 IBLA 190 (Feb. 27, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of an association where the applicant failed to disclose the identity of its members on Part B of the application form (Form 3112-6a (June 1981)) or a separate accompanying sheet, as required by notice published in the Federal Register in accordance with 43 CFR 3102.5 (1983).

Turner Ass'n, 85 IBLA 374 (Mar. 26, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

only establishes the priority to be accorded conflicting applications.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

BLM may properly reject a first-drawn application in a simultaneous oil and gas lease drawing where the applicant has made reference to its qualifications file number, but has not complied with the requirements of 43 CFR 3102.5 as incorporated in 43 CFR 3112.2-3, which, together, require that the names of all parties in interest be stated on the application or on a sheet accompanying the application.

W.O.I.L. Associates, 85 IBLA 394 (Mar. 28, 1985)

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application, where it is shown that the application was in fact signed during the filing period.

Ruth C. Bezirium, 86 IBLA 29 (Apr. 3, 1985)

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose on Part B of his application form (Form 3112-6a (June 1981)) the identity of the filing service which assisted him in filing the application, in accordance with 43 CFR 3112.2-4. Failure to disclose will be treated as a substantive defect.

Carl S. Matuszek, O. M. Holley, 86 IBLA 124 (Apr. 16, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

BLM may properly reject a simultaneous oil and gas lease application where the applicant failed to disclose that he received the assistance of any person or entity in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program.

John G. O'Leary, 86 IBLA 131 (Apr. 22, 1985)

James D. Buergerl, 88 IBLA 168 (Aug. 19, 1985)

W. C. Palmer, 100 IBLA 349 (Jan. 11, 1988)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

An automated simultaneous oil and gas lease application Part B, form 3112-6a, which is unsigned is properly found to be unacceptable.

Satellite 8309220, 87 IBLA 93 (May 30, 1985)

If the identity of the holder of an interest in an oil and gas lease application is not disclosed on the application form, the application must be rejected for failure to disclose a party in interest. If a person has an interest in more than one application filed for the same parcel, the application must be rejected as constituting a prohibited multiple filing.

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease,

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.E.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

Pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous noncompetitive oil and gas lease application for such lands must be rejected.

Neva F. Riley, 89 IBLA 216 (Oct. 25, 1985)

Where amended regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers along with instructions of a general secretarial nature as to how the application

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

should be completed, has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Glen E. McCuiston, 89 IBLA 228 (Oct. 29, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

David R. Wilson, 90 IBLA 7 (Nov. 27, 1985)

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

Carolyn J. McCutchin, 93 IBLA 134 (July 29, 1986)

BLM may properly reject a first-drawn application in a simultaneous oil and gas lease drawing where the applicant has not complied with 43 CFR 3112.2-4, requiring disclosure of the name of the filing service that assisted the applicant.

William Reppy, Carmon H. Olson, 90 IBLA 80 (Dec. 19, 1985)

The Secretary has broad discretion to frame per se rules in administering the simultaneous oil and gas leasing program. Thus, an application that violates 43 CFR 3112.2-4 by failing to disclose any party or filing service which is in the business of providing assistance to participants in the program is properly rejected for violation of the regulation alone.

William Reppy (On Reconsideration), 91 IBLA 191 (Mar. 31, 1986)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

BTA Oil Producers, 91 IBLA 268 (Apr. 11, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 186

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a \$75 processing fee for each Part B application form, where the applicant failed to submit separate remittances, in payment of the filing fees and first year's rentals with each Part B application.

Eugen Georgescu, 91 IBLA 387 (Apr. 28, 1986)

Thomas & Nancy Wiekert, 92 IBLA 107 (May 30, 1986)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Joseph W. Crowley, 92 IBLA 75 (May 23, 1986)

BLM may properly declare a simultaneous oil and gas lease application unacceptable and return the filing fee and first year's rental, minus a \$75 processing fee, where the applicant failed to file the application timely with the Wyoming BLM State Office.

Merle R. Yontz, 93 IBLA 77 (July 16, 1986)

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Joel Yancey Wilson, 93 IBLA 101 (July 22, 1986)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

Where a simultaneous oil and gas lease application has been included in a drawing and been accorded a priority, subsequently discovered mismatched Parts A and B identification numbers may not be used as a basis for finding the application to be unacceptable.

Edward F. Scholls, 93 IBLA 138 (July 30, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof, the land is determined to be within the known geologic structure of a producing oil or gas field.

Hrubetz Oil Co., 93 IBLA 343 (Sept. 11, 1986)

A simultaneous oil and gas application which is filled out, signed, dated, and submitted by the applicant is improperly rejected for failure to disclose filing service assistance notwithstanding the fact the check tendered for the filing fees is drawn by a firm which provided the applicant with parcel recommendations where the funds were advanced by the applicant.

Ann Erhardt, 94 IBLA 317 (Nov. 24, 1986)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

Kerogen Crushers, 95 IBLA 63 (Dec. 19, 1986)

R. G. B. Co., 95 IBLA 300 (Jan. 29, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

Where it is clear from the record that the person signing a simultaneous oil and gas lease offer on behalf of a corporation is a duly authorized corporate officer, compliance is established with the requirements of the regulation at 43 CFR 3102.4 notwithstanding the fact the signing officer was identified as an attorney-in-fact.

Lear Petroleum Exploration, Inc., 95 IBLA 304 (Jan. 30, 1987)

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

BLM may properly declare simultaneous oil and gas lease applications unacceptable and return the filing fees and first year's rentals, minus a \$75 processing fee for each Part B application form, where the applicant failed to submit separate remittances in payment of the filing fees and first year's rentals with each Part B application, notwithstanding written advice from BLM that a single remittance would be acceptable.

Thomas S. Arnold, 97 IBLA 271 (May 14, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

Pursuant to the Notice published in the Federal Register on Aug. 19, 1983 48 FR 37656, issued under the authority of 43 CFR 3102.5, a limited partnership is required to submit with a simultaneously filed application for an oil and gas lease the names of all of its general partners, and all other partners holding or controlling more than 10 percent of the partnership. It is not required to submit a list of limited partners where such partners own 10 percent or less of the partnership.

TXP Operating Co., 99 IBLA 355 (Nov. 3, 1987)

If, on the face of Part B of a simultaneous oil and gas lease application, an applicant indicates the selection of a parcel by shading a tract number "bubble" for a tract which was not listed by parcel number as a parcel available for selection on the closing date for filing applications, such mark is surplus, and the application should not be deemed unacceptable for failure to submit the first year's rental and/or filing fee for that tract.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with 43 CFR 3112.2-3, by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a limited partnership if the applicant has not disclosed the identity of any partners on the application. Pursuant to the Notice issued under the authority of 43 CFR 3102.5, and published at 48 FR 37656 (Aug. 19, 1983), a limited partnership must submit, with its simultaneously filed oil and gas lease application, the names of all general partners and limited partners who own or control more than 10 percent of the partnership.

Santa Fe Energy Operating Partners, L.P., 101 IBLA 256 (Mar. 2, 1988)

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership where the applicant failed to disclose the identity of its general partners on the application form or on a separate accompanying sheet, as required by notice published in the Federal Register in accordance with 43 CFR 3102.5 (1983).

CDM Oil & Gas, 101 IBLA 293 (Mar. 15, 1988)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

Inclusion of a simultaneous oil and gas lease application in a lease drawing does not corroborate an assertion that a list of partners was filed with that application by the partnership/applicant sufficiently to overcome the presumption of regularity, where, under BLM's procedures, applications filed without a list of partners were not excluded from drawings and no list of partners was found in BLM's files.

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

BLM may properly reject a simultaneous oil and gas lease application where the partnership/applicant failed to disclose the identity of its partners on the application or submit a list of those partners with the application, a substantive requirement of the oil and gas leasing program.

JN Oil & Gas, 101 IBLA 394 (Apr. 1, 1988)

Pursuant to 43 CFR 3112.6-1(b), the power of attorney authorizing an attorney-in-fact to sign lease offers submitted under the simultaneous filing procedures must prohibit the attorney-in-fact from filing offers on behalf of any other offeror. Where the power of attorney fails to include such a prohibition, the offer is properly rejected.

Peggy A. Yates, 103 IBLA 341 (Aug. 9, 1988)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Lawrence A. Egan, 104 IBLA 57 (Aug. 25, 1988)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

A simultaneous oil and gas lease application is properly deemed unacceptable where the applicant's identification number is not entered on Part B of the application.

A. W. Rutter, Jr., 104 IBLA 296 (Sept. 14, 1988)

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens of the United States, associations of such citizens, corporations, and municipalities, occurs upon the filing of an application bearing the name of a single individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

The regulation at 43 CFR 3112.5-1(b)(4) precludes a trustee filing a simultaneous oil and gas application for a single parcel on behalf of more than one entity with which he has a fiduciary relationship. Applications filed in violation of this prohibition are properly rejected.

Payne Family Trust, 107 IBLA 78 (Jan. 31, 1989)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedDrawings--Continued

A simultaneous oil and gas lease application is properly deemed unacceptable where, although the identification number on Parts A and B is the same, each part lists a different entity as the applicant.

Aleron H. Larson, Jr., 109 IBLA 185 (June 9, 1989)

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. Where neither the relevant regulations nor the Federal Register notice interpreting the regulations requires that an individual applicant who names a partnership as another party in interest include a list of the partners in the partnership with the application, a decision rejecting the application on that basis will be reversed.

Dennis W. Belnap, 112 IBLA 243 (Dec. 28, 1989)

Filing

Prior to the July 23, 1983, amendment to 43 CFR 3110.2 (1983), which prohibited the withdrawal of an application filed under the automated simultaneous oil and gas leasing system, an application could be withdrawn provided the withdrawal was in writing and was received by BLM prior to the close of the filing period.

Where an applicant for a simultaneous oil and gas lease fails to designate a state prefix on the automated application form, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (1983), and the applicant is properly assessed a service charge of \$75 per application form and all other filing fees are returned.

Denver Resources, Inc., 84 IBLA 327 (Jan. 8, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

BLM may properly reject an acquired lands noncompetitive oil and gas lease offer filed for public domain lands.

Sam O. McReynolds, 85 IBLA 36 (Jan. 31, 1985)

Where a filing service is retained to file oil and gas lease applications on behalf of a partnership and instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981), forbidding multiple filings by a partnership for the same parcel.

Christopher F. Clancy, 85 IBLA 174 (Feb. 26, 1985)

Where a simultaneous oil and gas lease application is dated prior to the commencement of the filing period and it is established that such misdating was merely inadvertent and not done with an intent to obtain a lease by fraud and that the application was signed during the filing period, the misdating is a nonsubstantive error which does not require the rejection of the application.

Satellite 8305136, 85 IBLA 190 (Feb. 27, 1985)

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

An automated simultaneous oil and gas lease application Part B, form 3112-6a, which is unsigned is properly found to be unacceptable.

Satellite 8309220, 87 IBLA 93 (May 30, 1985)

Where amended regulations define any person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers only has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Ronald Valmonte, 87 IBLA 197 (June 14, 1985)

Angelo J. Sparacino, 91 IBLA 265 (Apr. 9, 1986)

Joseph W. Crowley, 92 IBLA 75 (May 23, 1986)

Under 43 CFR 3112.2-1(b) and 43 CFR 3102.4 (1982), a simultaneous oil and gas lease application must be rendered in a manner to reveal the name of the applicant, the name of the signatory, and their relationship, where the signatory is an agent or attorney-in-fact for the applicant. Where an individual signs the application as an attorney-in-fact it will be presumed, in the absence of evidence to the contrary, that the individual is the attorney-in-fact for the applicant.

T.E.T. Partnership et al. (On Reconsideration), 88 IBLA 13 (July 1, 1985)

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official approved form without additions, omissions, or other changes or advertising. An oil and gas lease offer is properly

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

rejected if the two sides of the approved form are copied on separate sheets of paper.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and to tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer.

Lottery Risk BO, Ltd., 88 IBLA 160 (Aug. 15, 1985)

A Feb. 1983 BLM decision barring an oil and gas lease applicant from further participation in simultaneous drawings pending the payment of an alleged debt was not effective during the time the applicant had to appeal and the timely filing of a notice of appeal suspended the effect of the decision. Thereafter, when the second drawee for a parcel in the Mar. 1983 drawing protests the selection of the barred applicant as first drawee, the protest is properly dismissed where the effect of the Board's ruling on the appeal was to remove the bar to participation.

Jewell Scott, Jr., 88 IBLA 307 (Sept. 17, 1985)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

Under 43 CFR 3112.0-5 and 3112.2-4, any simultaneous oil and gas applicant receiving the assistance of any person or entity which is in the business of providing assistance to participants in the Federal simultaneous oil and gas leasing program must indicate on the lease application the name of the party or filing service that provided assistance. Where an applicant admits that he has received such assistance and has not so indicated on Part B of his application, his application is properly rejected.

Robert R. Shrode, 89 IBLA 186 (Oct. 17, 1985)

Where amended regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications, an entity which merely provides an applicant with parcel recommendations in the form of parcel numbers along with instructions in a general secretarial nature as to how the application should be completed, has not "formulated" the application within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Glen E. McCuiston, 89 IBLA 228 (Oct. 29, 1985)

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Janet R. Larson, 91 IBLA 151 (Mar. 25, 1986)

Departmental regulations define a person or entity in the business of providing assistance to participants in the Federal simultaneous leasing program as one who signs, prepares, completes, or formulates applications. When the record indicates a third party did nothing more than provide an applicant with parcel recommendations, that party has not "formulated" the application



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

within the meaning of 43 CFR 3112.0-5 or 43 CFR 3112.2-4.

Bruce W. Yoshiwara, 91 IBLA 273 (Apr. 11, 1986)

A decision rejecting a simultaneous oil and gas lease drawing application bearing the holographic signature of the applicant on the basis that it has been executed in pencil rather than pen will be reversed on the ground that it is a nonsubstantive error.

Jack Williams, 91 IBLA 335 (Apr. 21, 1986) 93 I.D. 186

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 384 (Apr. 28, 1986)

BLM may not reject a simultaneous oil and gas lease application for failure to disclose the name of the entity which provided assistance to the applicant, pursuant to 43 CFR 3112.2-4, where the entity merely provided parcel recommendations and cannot be said to have "formulated" the application within the meaning of 43 CFR 3112.0-5.

Richard J. Lyons, 92 IBLA 54 (May 13, 1986)

Lawrence L. Krick, 92 IBLA 71 (May 22, 1986)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

Where a simultaneous oil and gas lease application has been included in a drawing and been accorded a priority, subsequently discovered mismatched Parts A and B identification numbers may not be used as a basis for finding the application to be unacceptable.

Edward F. Scholls, 93 IBLA 138 (July 30, 1986)

A simultaneous oil and gas application which is filled out, signed, dated, and submitted by the applicant is improperly rejected for failure to disclose filing service assistance notwithstanding the fact the check tendered for the filing fees is drawn by a firm which provided the applicant with parcel recommendations where the funds were advanced by the applicant.

Ann Erhardt, 94 IBLA 317 (Nov. 24, 1986)

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreements within 30 days of receipt of notice to do so, the application is properly rejected.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

An oil and gas lease application filed on an obsolete (1981) form formerly employed in the simultaneous oil and gas leasing program is properly accepted by BLM where the form is processed in the automated system without difficulty, where the applicant has marked and enclosed the proper remittance, and where the applicant has provided all information necessary to police the system to prevent fraud or abuse.

Albert L. Lang, Jr., 95 IBLA 357 (Feb. 11, 1987)

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

Departmental regulation 43 CFR 3111.1-1(a), oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.1-1(f).

Where an applicant submits evidence which supports a conclusion that two copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

regulation by filing only one copy of the lease offer will be set aside.

New Mexico & Arizona Land Co., 99 IBLA 190 (Oct. 13, 1987)

If, on the face of Part B of a simultaneous oil and gas lease application, an applicant indicates the selection of a parcel by shading a tract number "bubble" for a tract which was not listed by parcel number as a parcel available for selection on the closing date for filing applications, such mark is surplus, and the application should not be deemed unacceptable for failure to submit the first year's rental and/or filing fee for that tract.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

Under the regulation at 43 CFR 3112.2-1(b), an applicant is required to use its own personal or business address and use of the address of any other party which is in the filing service business is prohibited. A decision rejecting an application filed by a filing service in its own name as applicant on the ground a filing service address was used will be reversed as unsupported by the regulation.

Research Investment Co., Inc., 102 IBLA 151 (Apr. 27, 1988)

Under 43 CFR 3112.2-2(b), each Part B application form must be accompanied by a single remittance sufficient to cover the filing fee of \$75 and first year's rental payment for each parcel included in the application. If the remittance is insufficient, the entire filing is properly deemed unacceptable because an insufficient remittance is not a technical, or non-substantive, defect.

CNG Producing Co., 102 IBLA 210 (May 10, 1988)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of the notice as required by 43 CFR 3112.6-1(a). Delivery of such documents after regular business hours on the date they were required to have been filed does not constitute compliance with the 30-day requirement in 43 CFR 3112.6-1(a) where the documents are deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day.

Santa Fe Energy Co., 102 IBLA 393 (June 21, 1988)

Departmental regulation 43 CFR 3111.1-1(a) requires that an over-the-counter noncompetitive oil and gas lease offer be made on a current form approved by the Director, or on unofficial copies of that form in current use. Copies must be exact reproductions on one page of both sides of the official-approved form and must be manually signed in ink and dated by the offeror or the offeror's duly authorized agent or attorney in fact. An original and two signed copies of each offer to lease must be filed in the proper BLM office. An oil and gas lease offer which is not properly filed in accordance with these requirements must be rejected pursuant to 43 CFR 3111.11(f).

Where an applicant submits evidence which supports a conclusion that two signed copies of his noncompetitive lease offer were timely filed as required by the regulations in 43 CFR 3111.1-1(a), a decision rejecting that offer for failure to comply with the applicable regulation by filing only one signed copy of the lease offer will be reversed.

Bernard Silver, Frederick L. Smith, 104 IBLA 20 (Aug. 17, 1988)



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

A simultaneous oil and gas lease application is properly deemed unacceptable where the applicant's identification number is not entered on Part B of the application.

A. W. Rutter, Jr., 104 IBLA 296 (Sept. 14, 1988)

The Bureau of Land Management properly rejected over-the-counter oil and gas lease offers for lands previously included in expired leases since, under 43 CFR 3112.1-1 (1986), such lands were subject to the filing of noncompetitive lease offers only in accordance with simultaneous filing procedures.

Floyd J. Lauber, 105 IBLA 234 (Nov. 4, 1988)

When BLM decides to issue a noncompetitive oil and gas lease, it is required to issue the lease to the person first making application for the lease if that person is qualified to hold a lease. Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Sec. 1274.14 of the BLM Manual sets out binding Bureau policy on how to time and date stamp documents, including over-the-counter lease offers received through the U.S. Postal Service or commercial delivery service, and BLM decisions affording priority on the basis of this policy will be affirmed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through the U.S. Postal Service shall be time and date stamped as of the time and date of receipt, with the sole exception that any offer received in the first scheduled receipt of mail during the business day is properly time and date stamped as of the posted beginning hour for the day. In the absence of proof that an offer was in fact received by BLM in the first scheduled receipt of mail, BLM's action to time and date stamp the offer as of the time it was received will not be disturbed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through a commercial

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedFiling--Continued

delivery source shall be time and date stamped as of the time and date it is actually received.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens of the United States, associations of such citizens, corporations, and municipalities, occurs upon the filing of an application bearing the name of a single individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. Where neither the relevant regulations nor the Federal Register notice interpreting the regulations requires that an individual applicant who names a partnership as another party in interest include a list of the partners in the partnership with the application, a decision rejecting the application on that basis will be reversed.

Dennis W. Belnap, 112 IBLA 243 (Dec. 28, 1989)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedReinstatement

The back rental due when filing a petition for class II reinstatement is determined at the increased rates accruing from the date of termination. The increased rates are the rates which will apply if class II reinstatement is granted: a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases.

Neither 30 U.S.C. § 188(d)-(e) (1982), nor 43 CFR 3108.2-3, expressly require that fees for administrative costs and costs of publication in the Federal Register be submitted when a petition for class II reinstatement is filed or within the time limitation for filing a petition.

R. Gerald Jones, 101 IBLA 57 (Jan. 27, 1988)

Simultaneous

BLM is required to reject a simultaneous noncompetitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the application occasioned by Departmental review of noncompetitive leasing in the Wyoming overthrust belt area.

A simultaneous oil and gas lease applicant is not entitled to a refund of his filing fee unless it is established that BLM knew or should have known that the land was situated within a known geologic structure of a producing oil or gas field at the time it posted the land as available for simultaneous leasing.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedSimultaneous--Continued

Where a simultaneous noncompetitive oil and gas lease applicant uses as its mailing address a post office box rented and exclusively controlled by officers of a lease filing service, the applicant is merely using an alternate address for the service, in violation of 43 CFR 3112.2-1(b), which bars the use on the application of the address of any entity which is in the business of providing assistance to those participating in the simultaneous oil and gas leasing system.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

Under the regulation at 43 CFR 3112.2-1(b), an applicant is required to use its own personal or business address and use of the address of any other party which is in the filing service business is prohibited. A decision rejecting an application filed by a filing service in its own name as applicant on the ground a filing service address was used will be reversed as unsupported by the regulation.

Research Investment Co., Inc., 102 IBLA 151 (Apr. 27, 1988)

The Secretary of the Interior has no authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

Jack J. Grynberg, 106 IBLA 9 (Nov. 30, 1988)

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--Continued640-acre Limitation

An oil and gas lease offer for less than 640 acres or one full section, whichever is larger, is properly rejected, unless the offer includes all available lands within a section and there are no contiguous lands available for lease.

New Mexico & Arizona Land Co., 96 IBLA 178 (Mar. 18, 1987)

6-mile\_Square Rule

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

Excelsior Exploration Corp., 91 IBLA 76 (Mar. 3, 1986)

BLM properly rejects a noncompetitive oil and gas lease offer which does not comply with the requirements of 43 CFR 3110.1-3(b) that lands in an offer be entirely within an area of 6-miles square or within an area not exceeding six surveyed sections in length or width measured in cardinal directions.

W.O.I.L. Associates, 92 IBLA 312 (June 26, 1986)

When a description of lands sought in an offer to lease public lands for oil and gas cannot be embraced within a 6-mile square or within an area not exceeding six surveyed sections the offer is defective and must be rejected in its entirety, pursuant to 43 CFR 3110.1-3(b). 43 CFR 3110.1-3(b) specifically states that an offer shall describe lands within the designated area limitation.

Thomas J. Carmody, Anna S. Carmody, 94 IBLA 209 (Nov. 4, 1986)

OIL AND GAS LEASES--ContinuedAPPLICATIONS--Continued6-mile\_Square Rule--Continued

The Board will affirm a BLM decision rejecting a noncompetitive over-the-counter oil and gas lease offer for public domain lands where the lands cannot be embraced within a 6-mile-square area or an area not exceeding six surveyed sections in length and width, as required by 43 CFR 3110.1-3(b).

Doanld J. Kunkle, Ingrid M. Kunkle, 94 IBLA 212 (Nov. 5, 1986)

Sole\_Party\_in Interest

Where a filing service is retained to file oil and gas lease applications on behalf of a partnership and instead files four applications, each bearing the name of one partner, for the same parcel without any reference to the partnership or other parties in interest and said applications are paid for with partnership funds, the applications are partnership property. In the absence of a disclosure of the partnership's interest in such applications, 43 CFR 3102.2-7(a) (1981) has been violated. Moreover, as the holder of an interest in more than one application, the partnership has violated 43 CFR 3112.6-1 (1981) forbidding multiple filings by a partnership for the same parcel.

Christopher F. Clancy, 85 IBLA 174 (Feb. 26, 1985)

If the identity of the holder of an interest in an oil and gas lease application is not disclosed on the application form, the application must be rejected for failure to disclose a party in interest. If a person has an interest in more than one application filed for the same parcel, the application must be rejected as constituting a prohibited multiple filing.

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease,



OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedSole\_Party\_in Interest--Continued

the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

Where the evidence establishes that various associations have been formed by a filing service for the purpose of submitting simultaneous oil and gas lease applications with operating control of these associations vested only in officers or employees of the filing service, use of the home address of the president of the filing service as the address of the association violates the provisions of 43 CFR 3112.2-1(d) (1982).

Satellite 8211104 et al., 89 IBLA 388 (Nov. 22, 1985)

As a general rule, when a partner in a firm engaged in the oil and gas business files an oil and gas lease offer in his own name without disclosure of the interests of the partners, the offer is properly rejected for failure to disclose interested parties in compliance with the regulations. Rejection is mandated notwithstanding the existence of negotiations to terminate the partnership where the record discloses that the partnership agreement has not been terminated at the time the lease offer is filed.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

A filing service contract which includes a provision under which the filing service will sell

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedSole\_Party\_in Interest--Continued

its client's rights in oil and gas leases obtained by them is an agreement covering interests in oil and gas leases and itself constitutes an interest in oil and gas lease offers as defined at 43 CFR 3100.0-5(b) (1974).

A filing service contract which grants the filing service a percentage of the sales price and royalties due on any leases obtained by the client and sold by the filing service, gives the filing service a prospective or future claim to benefit from its client's leases and a right to share in the profits accrued from such leases as defined at 43 CFR 3100.0-5(b) (1974).

The regulatory definition of interests is not limited to the standard interests in oil and gas leases commonly recognized within the industry, but encompasses a broad range of methods of benefitting from a lease. It does not matter whether the benefit a filing service receives is enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. Nor does it matter that it might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers.

Raymond G. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

The regulation at 43 CFR 3112.5-1(b) (1987), prohibits any agreement, scheme, plan, or arrangement entered into prior to simultaneous oil and gas lease selection which gives any party more than a single opportunity of successfully obtaining a lease or interest therein. This regulation was not violated by filing an application bearing the name of an individual as applicant and listing 19 other parties in interest. In this case the filing service preparing the application customarily made the addresses of all parties in interest available to a lease broker, and prepared more than one application in this manner for the same parcel.

No violation of regulation 43 CFR 3102.1 (1987), limiting the holders of oil and gas leases to citizens of the United States, associations of such citizens,

OIL AND GAS LEASES--ContinuedAPPLICATIONS--ContinuedSole Party in Interest--Continued

corporations, and municipalities, occurs upon the filing of an application bearing the name of a single individual as applicant and showing 19 names as other parties in interest when the 20 individuals are grouped at random by a filing service, which had entered into a service agreement with each individual.

Henrikas Brazaitis, 107 IBLA 56 (Jan. 30, 1989)

2,560-acre Limitation

An oil and gas lease offer for lands in Alaska describing the lands sought as less than 2,560 acres or four full sections, whichever is larger, is properly rejected, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

Under 43 CFR 3110.1-3(a), the minimum size for a noncompetitive oil and gas lease offer in Alaska is 2,560 acres or four full contiguous sections, which ever is larger, where the lands are within an approved protracted survey, unless the offer includes all available lands within the subject sections and there are no contiguous lands available for lease. An offer is properly rejected where it is established that the lands applied for, although comprising four full contiguous sections, together comprised less than 2,560 acres, and that contiguous lands were also available for leasing.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

OIL AND GAS LEASES--ContinuedASSIGNMENTS OR TRANSFERS

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where the assignment of an oil and gas lease is pending before the Bureau of Land Management, the assignor is responsible for the performance of all obligations under the lease until the assignment has been approved. The failure of the Bureau of Land Management to approve an assignment by the rental due date does not excuse or justify the nonpayment or late payment of the rental.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 43 U.S.C. § 188(c) (1982).

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

A BLM decision requesting a new bond for an oil and gas lease prior to approval of assignment of the lease will be upheld where the assignee disputes the amount of the required bond but fails to establish error in BLM's determination of the bond amount.

Forest Gray, 88 IBLA 64 (July 22, 1985)

OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

Sec. 30a of the Mineral Leasing Act, 30 U.S.C. § 187a, limits the Secretary's discretionary authority to disapprove assignments generally, but preserves it with respect to certain assignments, including those containing a part of a legal subdivision.

The Secretary may disapprove partial assignments of oil and gas leases that are not made on a legal subdivision basis, i.e., not containing 40 acres or multiples thereof. Congress, however, took away the Secretary's authority, to disapprove, for any reason related to size, partial assignments that do conform to the public land survey.

When Congress speaks on a specific matter in the administration of Federal mineral leasing, it thereby defines the public interest and accordingly limits the Secretary's discretion with respect to that matter. A lease stipulation purporting to require a lessee to waive the right of assignment is inconsistent with sec. 30a of the Mineral Leasing Act.

Clarification of Secretarial Authority to Restrict the Size of Oil & Gas Lease Assignments, M-36778 (Supp.)  
(Aug. 13, 1984) 92 I.D. 121

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard H. Vinson et al., 90 IBLA 280 (Feb. 10, 1986)

Under 43 CFR 3108.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and

OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

the deficiency is nominal, the lease shall not automatically have terminated unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

An assignment of an oil and gas lease is ineffective until the proposed assignment has been approved by BLM. 30 U.S.C. § 187a (1982). Until such time as the assignment is approved, the party designated as the party responsible for payment of lease rentals on the lease to be assigned remains responsible for rental payments.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights and timely payment of the rental for the entire lease acreage is required to maintain the lease.

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert D. Fleck, Carl J. Williams, William L. Medalie, 91 IBLA 187 (Mar. 31, 1986)

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental



OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

required for the lands described in the partial assignment prior to the anniversary date.

Ruth L. Schwoerer, 92 IBLA 98 (May 28, 1986)

Where the record titleholder of an oil and gas lease fails to request reinstatement within 60 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

BLM should properly suspend action on a request for approval of assignment if it has received notice that the power of the attorney in fact to act on behalf of the assignor has been revoked and the request is signed by the attorney in fact after such revocation. Where BLM has incorrectly approved such a request, it should revoke such approval and suspend action until the parties have resolved the dispute as to the validity of the assignment.

Jack W. Stahl et al., 93 IBLA 207 (Aug. 20, 1986)

A BLM decision requiring submission of a bond for an oil and gas lease prior to the approval of a transfer of the lease will be upheld where the transferee disputes the amount of the required bond but fails to establish error in BLM's determination, thereof.

Dallas Oil Co., 93 IBLA 218 (Aug. 20, 1986)

OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

Where the description of lands included in an oil and gas lease assignment filed with BLM for approval is unclear and fails to conform to the lands described in the lease, neither BLM nor this Board is empowered to supply a description of the land to be conveyed by the proposed assignment, which is properly disapproved.

Donald & Barbara Schneider, 94 IBLA 84 (Sept. 30, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date. Where no rental is tendered timely either for the entire lease or for the acreage embraced in a pending unapproved assignment of record title, the lease is properly held to have terminated.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 30 U.S.C. § 188(c), (d), and (e) (1982).

Stanley I. Okun, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Where the unapproved assignee of a partial assignment of an oil and gas lease tenders, prior to the anniversary date of the lease, rental for that portion of the lease assigned to it, the lease as to that portion does not terminate, and a decision by BLM holding otherwise and returning the partial assignment unapproved will be reversed.

Russell Sinclair Grove, Jr., 94 IBLA 254 (Nov. 13, 1986)

OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert & Eileen Taylor, 94 IBLA 259 (Nov. 14, 1986)

BLM should properly suspend action on a request for approval of an assignment if it receives notice of a dispute between the parties as to the validity of the assignment.

J. R. Holcomb Oil, 96 IBLA 35 (Feb. 27, 1987)

When conflicting oil and gas lease assignments are filed with BLM, suggesting a controversy as to the validity of either or both of those assignments, the denial or approval of either of those assignments is improper; rather, BLM should suspend action on the assignments, maintaining the status quo until presented with either evidence that the parties have resolved the dispute or a copy of a court decree concerning the matter in controversy. However, if BLM has mistakenly approved one of the assignments, and subsequently denied approval of the other assignment, the approval will not be rescinded, but the denial will be set aside for a period of time sufficient to allow the parties to institute litigation or take other action to resolve the dispute. Failure to take appropriate action within the time allowed will result in confirmation of the approved assignment.

Herbert P. Kenney, Jr., 96 IBLA 84 (Mar. 2, 1987)

Robert Walli, 99 IBLA 128 (Sept. 22, 1987)

OIL AND GAS LEASES--Continued

## ASSIGNMENTS OR TRANSFERS--Continued

A decision disallowing a pending partial assignment of an oil and gas lease will be affirmed where, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

While a potential assignee of an oil and gas lease may pay the annual rental, BLM is under no obligation to give the potential assignee a courtesy notice of rental due prior to the lease anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

Pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), oil and gas leases may be issued to citizens, associations of citizens, or to a corporation organized under the laws of the United States or any State thereof. The filing of a proposed assignment in conformity with the applicable laws and regulations ordinarily requires approval by the Department except for lack of qualifications of the assignee or lack of a sufficient bond. A decision rejecting an assignment to a Delaware corporation on the ground it is not registered under State law to do business in the State where the oil and gas leases are located will be vacated where no such requirement is found in the statute or regulations governing qualifications to hold oil and gas leases, although such a factor may be relevant to setting bond coverage requirements.

Pardee Petroleum Corp., 98 IBLA 20 (May 29, 1987)

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)

OIL AND GAS LEASES--ContinuedASSIGNMENTS OR TRANSFERS--Continued

Where a lease achieves a discovery of oil or gas in paying quantities during the third year of its primary term and a partial assignment of this lease occurs during its tenth year, 30 U.S.C. § 187a (1982) does not provide a basis for extending the undeveloped assigned lease segregated by such assignment.

Fuel Resources Development Co., 100 IBLA 37 (Nov. 19, 1987)

To qualify for protection as a bona fide purchaser under 30 U.S.C. § 184(h)(2) (1982), and 43 CFR 3108.4, an assignee must have acquired his interest in good faith, for valuable consideration, and without notice of any violation of the law. Bona fide purchaser protection applies only where consideration has actually been paid prior to actual or constructive notice of an outstanding interest or defect in title. Where a money market account is established to secure the consideration paid by assignee, and where it is agreed that the consideration paid will be held until approval of assignment (which event never occurs) the assignee is not entitled to protection as a bona fide purchaser.

A "remote purchaser" of an oil and gas lease interest is one who purchases such interest from a bona fide purchaser of the lease. Where it is determined that the seller of the lease interest is not a bona fide purchaser, the buyer is not entitled to the protection afforded to a remote purchaser.

Where purchasers of an interest in an oil and gas lease enter into assignment agreements after BLM places notice of the possible cancellation of the lease in its official records, the purchasers have constructive notice of possible defects in the lease at the time they acquire their lease interests and, therefore, lack the good faith essential to an entitlement to protection as bona fide purchasers.

Robert L. True (d.b.a. Comanche Enterprises), Petroleum Research Corp., et al., SATELLITE 8303116, 101 IBLA 320 (Mar. 17, 1988)

OIL AND GAS LEASES--ContinuedASSIGNMENTS OR TRANSFERS--Continued

Where an underlying oil and gas lease offer has been previously rejected, and no appeal was taken, there is no longer any interest which can be assigned from the offeror, and a request for approval of an assignment from the offeror to another party is properly rejected.

Eddeman Community Property Trust, 106 IBLA 376 (Jan. 19, 1989)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

Application for approval by the Bureau of Land Management of an assignment of record title to an oil and gas lease is made by the assignee of the lease. An assignment filed in conformance with the applicable law and regulations ordinarily requires approval by the Department as to qualifications of the assignee and sufficiency of a bond.

A unilateral request by the assignor of an oil and gas lease for withdrawal of an unapproved assignment is properly regarded as a protest of the assignment and as an indication of a dispute between the parties to the assignment. Longstanding Departmental policy requires withholding action on the assignment



OIL AND GAS LEASES--ContinuedASSIGNMENTS OR TRANSFERS--Continued

until the dispute between the parties is resolved through agreement or litigation.

Ernhart, Inc., Thomas Hope, Jr., 108 IBLA 267 (Apr. 25, 1989)

The assignee, upon approval of the assignment, becomes the lessee of the Government as to the assigned interest and is responsible for complying with all lease terms and conditions. The burden rests with the assignee to apprise himself of the lease terms and all rules, regulations, and law regarding the lease.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

Where the assignment of an oil and gas lease is pending before BLM, the assignor is responsible for the performance of all obligations under the lease until the assignment has been approved. The failure of BLM to approve an assignment by the rental due date does not excuse or justify the nonpayment or late payment of rental.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

Approval of an assignment of record title interest to a portion of the lands embraced in an oil and gas lease has the effect of segregating the assigned tract into a separate lease effective on the first day of the month following the filing of all necessary documents in the proper BLM office. Although the termination of the parent lease for failure to pay the annual rental by the anniversary date, subsequent to the filing of the assignment, will not preclude approval of the assignment where the annual rental for the assigned tract has been timely tendered, a decision denying approval of the assignment will be affirmed where the parent lease has terminated for failure to pay the annual rental and the assignee has not continued to tender the annual rental for the assigned tract.

Gary L. Baird, 111 IBLA 280 (Oct. 26, 1989)

OIL AND GAS LEASES--ContinuedBONA FIDE PURCHASER

The protection afforded by 30 U.S.C. § 184(h)(2) (1982) to a bona fide purchaser of an oil or gas lease which issued noncompetitively applies only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It does not apply where the lease was erroneously issued for lands not subject to noncompetitive leasing.

Where the assignee of an oil and gas lease is chargeable with actual or constructive knowledge of the fact that the lease improperly issued, the assignee may not assert bona fide purchaser status pursuant to 30 U.S.C. § 184(h)(2) (1982).

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

The provision of 30 U.S.C. § 184(h)(2) (1982), protecting the interests of bona fide purchasers from certain action by the Department to cancel an oil and gas lease is not applicable to expiration of a lease by operation of law under 30 U.S.C. § 226 (1982).

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

The protection afforded by 30 U.S.C. § 184(h)(2) (1982), to a bona fide purchaser of an oil or gas lease applied only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It does not apply where the lease was erroneously issued for lands not subject to leasing.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

To qualify for protection as a bona fide purchaser under 30 U.S.C. § 184(h)(2) (1982), and 43 CFR 3108.4, an assignee must have acquired his interest in good faith, for valuable consideration, and without notice of any violation of the law. Bona fide purchaser protection applies only where consideration has actually been paid prior to actual or constructive notice of an outstanding interest or defect in title. Where a money market account is established to secure the consideration paid by assignee, and where it is agreed that the

OIL AND GAS LEASES--ContinuedBONA FIDE PURCHASER--Continued

consideration paid will be held until approval of assignment (which event never occurs), the assignee is not entitled to protection as a bona fide purchaser.

A "remote purchaser" of an oil and gas lease interest is one who purchases such interest from a bona fide purchaser of the lease. Where it is determined that the seller of the lease interest is not a bona fide purchaser, the buyer is not entitled to the protection afforded to a remote purchaser.

Where purchasers of an interest in an oil and gas lease enter into assignment agreements after BLM places notice of the possible cancellation of the lease in its official records, the purchasers have constructive notice of possible defects in the lease at the time they acquire their lease interests and, therefore, lack the good faith essential to an entitlement to protection as bona fide purchasers.

Robert L. True (d.b.a. Comanche Enterprises), Petroleum Research Corp., et al., SATELLITE 8303116, 101 IBLA 320 (Mar. 17, 1988)

Where, at the time of lease issuance, BLM's records pertaining to the lease revealed no indication that the lease had been issued in violation of the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1982), but rather indicated that sufficient and proper analysis of potential environmental impacts had been completed prior to lease issuance, reliance by an assignee of the lease on the BLM decision to issue the lease is not unreasonable and will support assignee's claim of bona fide purchaser status.

Clayton W. Williams, Jr., Exxon Corp., 103 IBLA 192 (July 25, 1988)  
95 I.D. 102

BONDS

A designated oil and gas lease operator may file an operator's bond in lieu of the lessee providing a general lease and drilling bond, but such operator's bond must be conditioned upon compliance with all lease terms and conditions for the entire leasehold,

OIL AND GAS LEASES--ContinuedBONDS--Continued

even though the operator has only part of the acreage assigned to his operations.

Where an operator provides a bond, regardless of the percentage of interest in the lease or the lease acreage covered by the interest, the bond is conditioned upon compliance with all the terms and conditions of the oil and gas lease; however, the bond may be released where the operator has completed successful reclamation on the well for which the bond was furnished, if the bonds of other operators on the leasehold, so conditioned, remain effective.

Atlantic Oil Corp., 85 IBLA 245 (Mar. 4, 1985)

A BLM decision requesting a new bond for an oil and gas lease prior to approval of assignment of the lease will be upheld where the assignee disputes the amount of the required bond but fails to establish error in BLM's determination of the bond amount.

Forest Gray, 88 IBLA 64 (July 22, 1985)

A BLM decision requiring submission of a bond for an oil and gas lease prior to the approval of a transfer of the lease will be upheld where the transferee disputes the amount of the required bond but fails to establish error in BLM's determination, thereof.

Dallas Oil Co., 93 IBLA 218 (Aug. 20, 1986)

The period of liability of an oil and gas lease bond may not be terminated until all the terms and conditions of the lease have been satisfied, including the payment of all necessary compensatory royalty.

R. K. Teichgraeber, 96 IBLA 249 (Mar. 25, 1987)

OIL AND GAS LEASES--ContinuedBONDS--Continued

BLM has authority under 43 CFR 3104.5 to increase the required amount of bond coverage for Federal oil and gas leases whenever circumstances justify a conclusion by BLM that the previously set bond coverage is insufficient to ensure fulfillment of all lease obligations. A BLM decision requiring an increase in the amount of bond coverage for ongoing lease operations will be upheld where the party required to post the increased amount disputes the increase but fails to establish error in BLM's determination thereof.

Pardee Petroleum Corp., 98 IBLA 20 (May 29, 1987)

Under 43 CFR 3104.5, BLM has authority to increase the amount of coverage required of any surety bonds of an oil and gas lessee or operator when additional coverage will be reversed where the increase is based on a higher minimum set out in proposed regulations, or an asserted underpayment of royalties when the Department admits in other litigation that the lessee has in fact overpaid the royalties.

BLM may terminate the requirement to hold an oil and gas lease surety bond when an oil and gas operator has fulfilled all the lease terms and posted an acceptable alternative bond.

Marathon Oil Co., 102 IBLA 285 (May 25, 1988)

A nationwide bond filed pursuant to 43 CFR 3045.4 by a party planning to conduct geophysical exploration for oil and gas on lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 291-301 (1970), does not satisfy the requirements of sec. 9 of the Stock-Raising Homestead Act. 43 CFR Part 3045 is applicable only to those cases where the surface of the lands to be explored is owned by the United States and administered by the Secretary of the Interior through the Bureau of Land Management.

Gary Maughan, 105 IBLA 206 (Nov. 2, 1988)

OIL AND GAS LEASES--ContinuedBONDS--Continued

Where no acceptable alternative bond has been filed, BLM properly refuses to terminate a surety's liability on an oil and gas lease bond bearing no expiration date, even though its principal has failed to satisfy the bond premium.

Fidelity & Deposit Co. of Maryland, 109 IBLA 389 (June 26, 1989)

BURDEN OF PROOF

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Victor P. Smith, 101 IBLA 100 (Feb. 2, 1988)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that lands are within a KGS has the burden of establishing by a preponderance of the evidence that inclusion of the land is erroneous.

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic as well as structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)



OIL AND GAS LEASES--ContinuedBURDEN OF PROOF--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic, or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will not be set aside when it is not arbitrary and capricious and is supported by competent evidence.

Celeste C. Grynberg, Jack J. Grynberg, 106 IBLA 219 (Dec. 23, 1988)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. When the necessary showing is made, a BLM decision increasing the rental on the basis of the KGS determination will be reversed.

Osage Associates January 1983, 107 IBLA 233 (Feb. 21, 1989)

OIL AND GAS LEASES--ContinuedBURDEN OF PROOF--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

Joy Goldschmidt, Jack J. Grynberg, 107 IBLA 237 (Feb. 21, 1989)

Paul E. Pendergrass, 108 IBLA 125 (Mar. 31, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the structure in question is not productive in the land in question.

Petroport Corp., 109 IBLA 383 (June 26, 1989)

Where a dry hole adjacent to leased land is surrounded by producing wells and noncommercial producers exhibiting positive drill-stem tests for oil, a lessee's contention that a known geologic structure does not underlie his lease or that the structure in question is not productive is not proved.

Steven Gerald Kirkwood, 110 IBLA 363 (Sept. 14, 1989)

## OIL AND GAS LEASES--Continued

### BURDEN OF PROOF--Continued

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Terra Resources, Inc., 112 IBLA 94 (Nov. 28, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic, or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not production from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

Source Petroleum Co., 112 IBLA 184 (Dec. 13, 1989)

### CANCELLATION

The protection afforded by 30 U.S.C. § 184(h)(2) (1982) to a bona fide purchaser of an oil or gas lease which issued noncompetitively applies only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It does not apply where the lease was erroneously issued for lands not subject to noncompetitive leasing.

Where the assignee of an oil and gas lease is chargeable with actual or constructive knowledge of the fact that the lease improperly issued, the assignee may not assert bona fide purchaser status pursuant to 30 U.S.C. § 184(h)(2) (1982).

Where it is shown that an oil and gas lease which improperly issued embraces lands presently known to contain valuable deposits of oil or gas, the Department may not, consistent with 43 CFR 3108.3(e), administratively cancel such lease, but, rather, must

## OIL AND GAS LEASES--Continued

### CANCELLATION--Continued

commence suit in Federal court to obtain a judicial cancellation of the lease.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates.

Where an oil and gas lease has inadvertently been issued for land that was the subject of a then current lease in good standing, the later lease is properly canceled to the extent that it conflicts with the earlier lease.

L & B Land Lease Group 82-3, 88 IBLA 221 (Aug. 28, 1985)

The Secretary of the Interior has the authority to cancel by administrative decision a noncompetitive oil and gas lease which was invalid at its inception because it issued to a party other than the first-qualified applicant in violation of statute and Departmental regulations.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

Inexco Oil Co., 93 IBLA 124 (July 29, 1986)

OIL AND GAS LEASES--ContinuedCANCELLATION--Continued

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

A decision cancelling a competitive oil and gas lease issued to the high bidder established by tie-breaking bid at a competitive lease sale will be reversed where BLM followed its established procedure for requesting additional bids and there is no evidence of fraud or collusion in the bidding process. An apparent defect in service of notice on one of the tie bidders discovered after lease issuance will not justify cancellation where no timely appeal has been taken from refund of the bid deposit and it does not appear from the facts that the ability of the Government to obtain the highest qualified bid has been prejudiced.

Fortune Oil Co., 97 IBLA 85 (Apr. 28, 1987)

Where it is shown that an oil and gas lease which improperly issued embraces lands presently known to contain valuable deposits of oil or gas, the Department may not, consistent with 43 CFR 3108.3(c), administratively cancel such lease, but must commence suit in Federal district court to obtain a judicial cancellation of the lease.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

It is improper to cancel an oil and gas lease where BLM had previously approved the assignment of the lease, the assignees were bona fide purchasers, and it has not been shown that the lease was issued in violation of any statutory or regulatory provision.

Champlin Petroleum Co., 99 IBLA 278 (Oct. 21, 1987)

OIL AND GAS LEASES--ContinuedCANCELLATION--Continued

Where a simultaneous noncompetitive oil and gas lease applicant violates 43 CFR 3112.2-1(b) by using a post office box rented and exclusively controlled by officers of a lease filing service, it has failed to submit an application that would qualify it to receive an oil and gas lease, and administrative cancellation of a lease issued pursuant to the application is required.

SATELLITE 8309119, 99 IBLA 301 (Oct. 27, 1987)

SATELLITE 8307138, SATELLITE 8309175, 99 IBLA 307 (Oct. 27, 1987)

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. Where oil and gas leases were inadvertently issued for lands that had been designated by Congress as wilderness before issuance of the lease, the Bureau of Land Management properly cancels the lease as to those lands.

The protection afforded by 30 U.S.C. § 184(h)(2) (1982), to a bona fide purchaser of an oil or gas lease applied only where the predecessors-in-interest were in violation of some provision of the Act, such as the acreage limitations. It does not apply where the lease was erroneously issued for lands not subject to leasing.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

A parcel that is included in a lease which has terminated is subject to leasing only under the simultaneous noncompetitive system, as provided by 43 CFR 3112.1-1. Where this parcel is subsequently included in a lease issued by BLM pursuant to a noncompetitive over-the-counter lease offer form, this lease is issued in violation of controlling regulations, and BLM properly cancels the lease insofar as it covers the parcel.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)



OIL AND GAS LEASES--ContinuedCANCELLATION--Continued

The Secretary of the Interior has authority to cancel an oil and gas lease issued for lands not subject to leasing at the time of lease issuance. However, where BLM cancels a lease on the basis that oil and gas leasing had been suspended for the lands described in the lease in a previous agreement between BLM and the Forest Service, and it is subsequently shown that the suspension agreement was an improper withdrawal of Federal lands because the agencies failed to follow statutory withdrawal procedures in 43 U.S.C. § 1714 (1982), and the lands described in the lease are otherwise subject to leasing, it is improper to cancel the lease on the grounds the lands were not subject to leasing.

Clayton W. Williams, Jr., Exxon Corp., 103 IBLA 192 (July 25, 1988) 95 I.D. 102

Where a Federal oil and gas lease has issued covering land which has been patented with no mineral reservation to the United States in the patent, the oil and gas lease is properly canceled as to such land.

Under the over-the-counter noncompetitive leasing system, no offer to lease public domain lands could include acquired lands. Where it was subsequently shown that acquired lands were leased pursuant to a lease offer for public domain lands, the lease is properly canceled as to the acquired lands.

Atlantic Richfield Co., 105 IBLA 61 (Oct. 17, 1988)

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

OIL AND GAS LEASES--ContinuedCANCELLATION--Continued

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

Where an oil and gas lease has inadvertently been issued for land that was the subject of an existing lease, the later lease is properly cancelled to the extent that it conflicts with the earlier lease.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

CIVIL ASSESSMENTS AND PENALTIES

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance for a safety violation, the failure to have a belt guard on a pumpjack, the Bureau of Land Management may not assess the lessee a penalty for noncompliance if the lessee, acting in good faith, has complied timely with the terms of the order and if the purpose of the order, ensuring safety, has been fulfilled. No penalty will be imposed where the cited "hazard" is so minimal that the risk of actual harm is virtually nonexistent.

Chinook Resources, Inc., 85 IBLA 5 (Jan. 30, 1985)

Where an oil and gas operator is assessed a penalty for failure to obtain approval from the Bureau of Land Management under 43 CFR 3162.3-3 prior to constructing a flowline in connection with an oil and gas well, but the penalty is assessed under a subsection of the regulations which deals with an entirely different regulation, and it appears that there is no assessment

OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

prescribed for violation of 43 CFR 3162.3-3, the decision will be reversed.

Wintershall Oil & Gas Corp., 85 IBLA 101 (Feb. 14, 1985)

Failure to have more than one valve effectively sealed, as required by 43 CFR 3162.7-4(b)(1), requires an assessment of \$250 for each unsealed valve, in accordance with 43 CFR 3163.3(j), because each failure is a specific instance of noncompliance.

Farmers Union Central Exchange, Inc., 87 IBLA 332 (June 26, 1985) 92 I.D. 281

When the Bureau of Land Management cites an oil and gas lessee for an incident of noncompliance with regulatory requirements, i.e., the failure to effectively seal a valve, the applicable regulation, 43 CFR 3163.3, requires that the Bureau of Land Management levy an assessment in the amount provided by the regulation.

Yates Energy Corp., 89 IBLA 150 (Oct. 4, 1985)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to remove oil contaminated soil from the well site pursuant to 43 CFR 3162.5-1 and assess liquidated damages for failure to timely comply with that notice by removing all contaminated soil. However, the assessment for noncompliance will be reduced to a one-time, rather than a successive, charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

Willard Pease Oil & Gas Co., 89 IBLA 236 (Oct. 29, 1985)

OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

Issuance of a valid notice of an incident of noncompliance for failure to segregate topsoil, as required by an approved application for permit to drill, reasonably results in an assessment pursuant to 43 CFR 3163.3(g).

Bowers Oil & Gas Exploration, Inc., 89 IBLA 316 (Nov. 12, 1985)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with the regulations in 43 CFR Part 3100, applicable with the terms or written order or instruction of an authorized officer is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage to the lessor from the specific incident of noncompliance. Thus, a correctly issued notice of incident of noncompliance will be the basis for the levy of a minimum assessment regardless of good faith effort to abate the condition after issuance.

An assessment levied on the basis of a successive per day amount may be reduced to a one-time charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

Mont Rouge, Inc., 90 IBLA 3 (Nov. 27, 1985)

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Somont Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

Where BLM issues notices of incidents of noncompliance to an oil and gas operator for failure to seal "appropriate valves" under 43 CFR 3162.7-4(a) and assesses the operator \$250 per violation in accordance with 43 CFR 3163.3(j), and on appeal the operator establishes that, as applied to the operator's situation, the "appropriate valve" requirement is ambiguous, the violations and assessments will be overturned.

Anadarko Production Co., 91 IBLA 154 (Mar. 25, 1986)

Failure to obtain written approval prior to initial drilling, plug-back, or recompletion drilling operations violates provisions both of 25 CFR 211.20 and 30 CFR 221.21(b) (1982). Whether a penalty should be assessed under provision of 25 CFR 211.22 or 30 CFR 221 requires interpretation of both the regulatory scheme and the oil and gas lease affected. Departmental regulations implementing the Indian Mineral Leasing Act are found to have specific and primary application in cases involving Indian lands leased for oil and gas.

Where a lessee of Indian lands commences drilling operations without written approval, penalties assessed must be reasonably related to the nature of the prohibited conduct. Maximum penalties should not be imposed if mitigating circumstances are present. Pursuant to provision of 25 CFR 211.22, the amount of penalty to be imposed is committed to the sound exercise of agency discretion.

Determination of the proper amount to be assessed as a penalty for violation of the provisions of 25 CFR subpart 211 is committed to the sound discretion of the agency and is governed by considerations of fairness applied to the individual facts of each violation.

William Perlman, 91 IBLA 208 (Apr. 2, 1986) 93 I.D. 159

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

Departmental regulation 43 CFR 3162.7-4(d)(1) (1984) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a \$100 assessment under 43 CFR 3163.3(h) (1984). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Fuel Resources Development Co., 91 IBLA 242 (Apr. 8, 1986)

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with an applicable regulation, lease term, or written order is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. An assessment levied on the basis of a successive per-day amount may be reduced to a one-time charge to reflect a change in 43 CFR 3163.3.

An assessment levied pursuant to 43 CFR 3163.3(a) is for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. An assessment may be levied where compliance with an order or instruction is not achieved within the specified period regardless of the apparent gravity of the impact of the noncompliance.

When an oil and gas lease operator has failed to report an oil spillage as required by 43 CFR 3162.5-1(c) and has failed to respond to BLM instructions to report the amount of oil spilled in the monthly report of operations as required by 3162.4-3, these separate actions may be treated as separate incidents of noncompliance.

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in



OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

Department policy that such assessments should automatically be levied.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Lycro Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

A decision assessing liquidated damages pursuant to 43 CFR 3163.3(d) for an oil and gas lessee's failure to obtain approval before recompleting a well in a different interval will be reversed where the formation in which the well was recompleted has been determined by order of the state conservation commission to be part of a common pool embracing both the recompletion formation and the formation in which the well was initially completed.

Energy Reserves Group, Inc., 92 IBLA 219 (June 23, 1986)

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 25, 1986)

An assessment pursuant to 43 CFR 3163.3(d) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should be automatically levied.

Bolack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

Where BLM issues an incident of noncompliance for failure of the transporter to "isolate the sales tank" during the "sales phase" and assesses the oil and gas lease operator \$250 in accordance with 43 CFR 3163.3(j), and on appeal the record indicates the transporter had not transferred any oil or engaged in any activity which would violate the integrity of the storage system, the "sales phase" had not commenced and the violations and assessments will be overturned.

Petrostates Resources, Inc., 93 IBLA 165 (Aug. 12, 1986)

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to timely file a notice of production start-up may be vacated by this Board, in view of the suspension of that regulation and a change in Departmental policy that such assessments should automatically be levied.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

An assessment for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should automatically be levied.

Balcron Oil Co., 94 IBLA 71 (Sept. 30, 1986)

BLM may properly issue a notice of incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations with respect to an oil and gas lease, where that document is not in the record and the presumption that BLM did not lose or misplace it has not been rebutted.

An assessment of liquidated damages for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Apollo Energy Inc., 94 IBLA 154 (Oct. 23, 1986)

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits on a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

appellant fails to provide any countervailing evidence to show the decision is in error.

Mapco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)

An automatic assessment for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should automatically be levied.

Berenergy Corp., 94 IBLA 264 (Nov. 17, 1986)

Automatic assessments for failure to file timely production reports pursuant to 43 CFR 3163.3(h) are vacated in deference to a later issued BLM Instruction Memorandum suspending enforcement of 43 CFR 3163.3(h).

Davis Oil Co., 94 IBLA 325 (Nov. 24, 1986)

An automatic assessment for failure to maintain effective seals pursuant to the regulation at 43 CFR 3163.3(j) may be vacated by the Board on appeal in view of the suspension of that regulation and the change in Departmental policy that such assessments should be automatically levied.

Robert L. Bayless, 94 IBLA 335 (Nov. 26, 1986)

The BLM may properly cite an oil and gas lessee for an INC with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation and the change in Department policy that such assessments should be levied automatically.

Mingo Oil Producers, 94 IBLA 384 (Dec. 8, 1986)

OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal valves as required by 43 CFR 3162.7-4(b)(1).

An assessment for failure to seal appropriate valves levied pursuant to 43 CFR 3163.3(j) may be vacated by the Board in view of the suspension of that regulation by the Bureau of Land Management and the change in Department policy regarding automatic assessments.

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely comply with that notice by calibrating the meters. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

OIL AND GAS LEASES--Continued

## CIVIL ASSESSMENTS AND PENALTIES--Continued

A BLM decision imposing civil penalties pursuant to the Federal Oil and Gas Royalty Management Act for continued noncompliance with an order to eliminate low spots in meter hoses will be affirmed on appeal where the record shows the lessee failed to comply with the order, and the order was designed to ensure the accuracy of the meter readings in accordance with the terms of the lessee's application for permit to drill.

William Perlman, 96 IBLA 327 (Apr. 7, 1987)

BLM may properly render an assessment of \$250 under 43 CFR 3163.3(a) against a unit operator who fails to comply with a written order to submit site-facility diagrams for all facilities located on lands subject to a unit agreement approved by the Department's authorized officer, whether those facilities are located on private, Federal, or Indian leases. The \$250 assessment for noncompliance with BLM's written order is a one-time charge per violation under 43 CFR 3163.3.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

The BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7(b)(1).

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be



## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

vacated by this Board in view of the suspension of that regulation.

The determination that an assessment for non-compliance with 43 CFR 3103.3(a) should be levied is discretionary, and the levy of an assessment is not automatic. The Board will set aside a BLM technical and procedural review decision that levy of an assessment is automatic and remand the case to allow BLM's exercise of discretion.

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

The procedural protection afforded by sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982 (43 U.S.C. § 1719 (1982)), does not apply to assessments levied under the oil and gas lease operating regulations.

In addition to any loss or damage to Federal resources and improvements which may result from a violation of the operating regulations, BLM incurs costs and expenses which would not have been incurred but for the noncompliance. If the issuance of an INC is technically and procedurally correct and the operator fails to abate the violation within the specified time, it is proper to impose an assessment to cover loss or damage to the lessor from the noncompliance,

## OIL AND GAS LEASES--Continued

### CIVIL ASSESSMENTS AND PENALTIES--Continued

including administrative or other costs to the United States.

M. John Kennedy, 102 IBLA 396 (June 21, 1988)

BLM may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve as required by 43 CFR 3162.7-4.

An assessment made pursuant to 43 CFR 3163.3(a) (1986), may be levied where an operator has failed to comply with a written order or instruction of an authorized BLM officer.

Dalport Oil Corp., 104 IBLA 327 (Sept. 21, 1988)

Assessment of a civil penalty pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 for knowingly and willfully failing to timely make a royalty payment as specified in an administrative order will be affirmed on appeal after a hearing where it is established that the party either knew or showed reckless disregard of whether its actions violated the order.

Conveyances of public lands to Alaska Native corporations pursuant to sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), are subject to valid existing rights including any outstanding Federal oil and gas leases. While the Native corporation succeeds to the rights of the United States as lessor in any such lease, the Department retains the statutory right to administer the lease unless it is waived. Where it appears from the record that the right to administer the lease has not been waived, the provisions of the Federal Oil and Gas Royalty Management Act of 1982 are properly applied to the administration of such a lease.

Assessment of a civil penalty for knowingly and willfully failing to comply with a final royalty payment order pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 pending judicial review of the propriety of that order will be affirmed as not violating constitutional due process restrictions by impairing the right to judicial review

OIL AND GAS LEASES--ContinuedCIVIL ASSESSMENTS AND PENALTIES--Continued

where the lessee assessed has failed to avail itself of the opportunity to obtain a stay of the royalty payment order conditioned upon the tender of acceptable security for the obligation at issue.

The exercise of the Secretary's discretion to set the amount of a civil penalty assessed pursuant to sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 after a hearing properly requires the exercise of reasoned discretion on a case-by-case basis. Factors properly considered in deciding the amount of the penalty include the good or bad faith of appellant in violating the order, the injury to the public resulting from the violation, the benefit derived by appellant from the violation, the ability of appellant to pay a penalty, and the need to deter such conduct and to uphold the authority of the Minerals Management Service.

Marathon Oil Co. v. Minerals Management Service,  
106 IBLA 104 (Dec. 14, 1988) 95 I.D. 265

BLM may properly assess a designated operator \$250 pursuant to 43 CFR 3163.3(a) (1986), for failure to comply, within a designated abatement period, with a written order to abide by stipulations governing abandonment of a lease well, regardless of whether the failure to comply might be attributable to a "de facto" operator of the well.

Celeste C. Grynberg (dba Grynberg Petroleum Co.),  
106 IBLA 387 (Jan. 23, 1989)

Under 43 CFR 3163.1(b)(2) (1987), BLM shall impose an immediate assessment when an oil and gas lessee commences drilling or causes a surface disturbance preliminary thereto without obtaining prior BLM approval. The amount of the assessment, prescribed in the regulation, shall be \$500 for each day that the violation exists, including the days the violation existed prior to discovery, not to exceed \$5,000.

Noel Reynolds, 110 IBLA 74 (July 24, 1989)

OIL AND GAS LEASES--ContinuedCIVIL ASSESSMENTS AND PENALTIES--Continued

Under 43 CFR 3162.5-1(c) and NTL 2-B, BLM may properly require the removal of all fluids discharged into a surface pit and may impose a civil assessment for failure to timely comply with an order to do so.

Conley P. Smith Oil Producer, 110 IBLA 92 (July 27, 1989)

COMMUNITIZATION AGREEMENTS

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Wexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

BLM may properly require the operator of a communitized area to conduct a 60-day test of a well pursuant to 43 CFR 3162.4-2(b), where the communitization agreement and the leases thereunder are each held in an extended term and the well at issue has been shut in for 2 years.

Byron Oil Industries, Inc., 100 IBLA 84 (Nov. 30, 1987)

OIL AND GAS LEASES--ContinuedCOMMUNITIZATION AGREEMENTS--Continued

The lessee of a Federal oil and gas lease committed to a communitization agreement providing for the apportionment of production among the leases committed thereto is responsible for payment of royalty to MMS on the share of production allocated to his lease. The lessor's entitlement to a royalty on the allocated share of production from any lessee/operator producing and selling communitized substances from the unit will not diminish the responsibility of the lessee where the operator has defaulted on the royalty obligation.

Jerry Chambers Exploration Co., John M. Beard,  
107 IBLA 161 (Feb. 10, 1989)

COMPENSATORY ROYALTY

BLM may properly provide for the assessment of compensatory royalty pursuant to 43 CFR 3162.2(a) where an oil and gas lessee fails to drill a well to protect the lessor from loss of royalty due to drainage, and the lessee has failed to demonstrate that the quantity of oil or gas underlying the lease which would be lost by drainage is not sufficient to pay the cost of drilling and operating the well at a reasonable profit.

When the record supports a conclusion that drainage is occurring, but also indicates BLM's intent to have a lessee pay compensatory royalties, regardless of whether or not a paying productive well can be drilled, the decision will be vacated and the case remanded to BLM to provide appellant an opportunity to submit evidence that a prudent operator would not drill a protective well.

Gulf Oil Exploration & Production Co., 94 IBLA 364  
(Dec. 4, 1986)

The period of liability of an oil and gas lease bond may not be terminated until all the terms and conditions of the lease have been satisfied, including the payment of all necessary compensatory royalty.

R. K. Teichgraber, 96 IBLA 249 (Mar. 25, 1987)

OIL AND GAS LEASES--ContinuedCOMPENSATORY ROYALTY--Continued

Compensatory royalties for failure to protect against drainage commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. Such notice may be given by BLM or by a third party. If BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, the requirement of notice is satisfied.

CSX Oil & Gas Corp., G. J. Morgan, 104 IBLA 188  
(Sept. 9, 1988) 95 I.D. 148

Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill an offset well unless there is a sufficient quantity of oil and gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. When BLM has established that a leased Federal tract is being drained by a well operated by a common lessee, it need not prove as a part of its cause of action that a protective well would be economic. In such cases, the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. The common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

If the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas, there would be no breach of a lessee's duty to prevent drainage. However, if a lessee can make a reasonable profit by drilling the well, he should drill. The prudent operator test is applied looking to the reasonably anticipatable recovery from



OIL AND GAS LEASES--ContinuedCOMPENSATORY ROYALTY--Continued

the offset well, rather than the oil and/or gas which would be lost if the offset well were not drilled.

Atlantic Richfield Co., 105 IBLA 218 (Nov. 2, 1988)  
95 I.D. 235

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

A BLM decision requiring an oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well will be set aside and the case remanded to BLM where BLM assessed royalty from the date of first production of the well, rather than from a reasonable time following notice to the lessee.

Chevron U.S.A. Inc., 107 IBLA 126 (Feb. 6, 1989)

The prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas that it drained from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

Atlantic Richfield Co. (On Reconsideration), 110 IBLA 200 (Aug. 21, 1989)  
96 I.D. 363

OIL AND GAS LEASES--ContinuedCOMPENSATORY ROYALTY--Continued

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by either drilling a well or unitizing the drained area. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil

## OIL AND GAS LEASES--Continued

### COMPENSATORY ROYALTY--Continued

and/or gas which would be lost if the well were not drilled.

Cordillera Corp., 111 IBLA 61 (Sept. 20, 1989)

### COMPETITIVE LEASES

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Exxon Co., U.S.A., 85 IBLA 135 (Feb. 19, 1985)

Michael Shearn, 87 IBLA 168 (June 13, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of

## OIL AND GAS LEASES--Continued

### COMPETITIVE LEASES--Continued

opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Dan Nelson, 85 IBLA 156 (Feb. 25, 1985)

Howell Spear, 86 IBLA 8 (Mar. 29, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation, the bidder must not only disprove the Government's fair market estimates, but must also prove that his bids constitute fair market value. However, appellant does not bear this burden until after the Government has established a prima facie case supporting its estimates.

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

Where production is had under a state spacing order which would be attributable on a pro rata basis to Federal mineral interests within the spacing unit, such production prima facie establishes that the Federal land is within a known geologic structure of a producing oil and gas field, even where the United States has not consented to the communitization of

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

the Federal interests pursuant to the state spacing order.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

The requirement that a bidder in a competitive oil and gas lease sale must submit one-fifth of the bid amount with his bid is mandatory and will not be waived.

Dolton H. Simmons, 85 IBLA 297 (Mar. 13, 1985)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to reveal sufficient data in support of the decision to reject such bid, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Suzanne Walsh, 86 IBLA 83 (Apr. 11, 1985)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data to establish its prima facie correctness cannot support rejection of the high bid for the parcel.

Yates Petroleum Corp., 86 IBLA 252 (May 2, 1985)

The rejection of the high bid for an oil and gas lease offered at a competitive lease sale will be affirmed where the administrative record shows that the much higher value of the parcel set by BLM was the product of careful and reasoned analysis, and appellant neither demonstrates error in BLM's appraisal nor

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

establishes that his bid accurately reflects the actual fair market value.

J. W. McTiernan, 87 IBLA 76 (May 28, 1985)

Where a decision to reject a competitive oil and gas lease sale high bid has been made in a careful and systematic manner utilizing the advice of Departmental experts and the record discloses a rational basis for the conclusion that the bid is inadequate, such a decision will not be overturned on appeal.

Petrovest, Inc., 88 IBLA 166 (Aug. 19, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Bureau of Land Management may reject a bid in a competitive lease sale where the bid does not conform to the conditions set out in the lease sale notice. Where a minimum bid of \$5 per acre was established by the advertised terms of sale, a bid for \$1.39 was properly rejected.

John R. Behrmann, 92 IBLA 64 (May 22, 1986)

Failure of the high bidder at a competitive oil and gas lease sale to execute a lease, tender the balance of the bonus bid, and pay the first year's lease rental within 30 days of notice to do so, results in forfeiture of the deposit submitted with the high



OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

bid. Refund of the deposit because offeror elects after the sale to withdraw his offer is not allowed.

D. B. Allsup, R. B. Allsup, 92 IBLA 197 (June 12, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krumbein, 92 IBLA 362 (June 30, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Read & Stevens, Inc., 93 IBLA 61 (July 15, 1986)

Read & Stevens, Inc., 93 IBLA 84 (July 16, 1986)

Before issuance of a competitive oil and gas lease for land within the area of an approved unit agreement, it is proper to require the successful bidder to file evidence that it has entered into an agreement with the unit operator for development of the land in the lease under the terms and provisions of the approved unit agreement or to file a statement giving satisfactory reasons for failure to enter such agreement.

Where a high bidder for a competitive oil and gas lease within the area of an approved unit agreement fails to file evidence showing joinder to the unit agreement or to submit satisfactory reasons for failure to enter into agreement with the unit operator, it is proper to reject the bid and to refund the balance of the bonus bid and the first year's rental. However,

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

where the bidder explains on appeal that it did make inquiry regarding joinder to the unit but received no response, and there are no intervening rights, the case may be remanded to BLM to allow the bidder additional time to submit proof of joinder.

Rodeo Oil Co., 93 IBLA 131 (July 29, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A BLM decision rejecting a high bid in a competitive oil and gas lease sale as inadequate will be affirmed if the record indicates the decision has been made in a careful and systematic manner utilizing the advice of the experts employed by the Department for making such determinations. A showing of a rational basis for the conclusion that the highest bid does not represent fair market value is sufficient.

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed in the absence of a showing of error.

The number of bids received at a sale of competitive oil and gas leases on any parcel does not necessarily represent an accurate test of fair market value, as bidders may consider other factors in making their bids.

When the Government rejects a competitive oil and gas lease high bid because it was less than the presale tract valuation and presents sufficient documentation supporting its valuation, the bidder must not only disprove the Government's fair market value estimates, but must also prove that his bid constitutes fair market value.

I. K. Rosen, 94 IBLA 202 (Nov. 4, 1986)

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Suzanne Walsh, 94 IBLA 249 (Nov. 13, 1986)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Once BLM establishes the prima facie correctness of its presale evaluation, a party appealing from rejection of its high bid must not only show error in the Government's evaluation, it must also affirmatively establish that its bid represents fair market value.

Harris-Headrick, 95 IBLA 124 (Jan. 6, 1987)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and fails to establish that its bid reasonably reflects fair market value.

MTS Limited Partnership, 95 IBLA 337 (Jan. 30, 1987)

Michael Shearn, 96 IBLA 13 (Feb. 26, 1987)



# OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

Suzanne Walsh, 98 IBLA 213 (July 1, 1987)

The Board will affirm BLM's dismissal of a protest of an oil and gas lease sale where the protestant's allegations that the winning bidder enjoyed an unfair advantage and that BLM was remiss in its duties in conducting the sale are unsupported by the record.

Chevron U.S.A. Inc., 96 IBLA 272 (Mar. 26, 1987)

If a reasonable and factual basis for a decision rejecting a high bid appears in the record, a prima facie case justifying the rejection is established and the burden shifts to the appellant to both affirmatively show error in BLM's decision and also establish that its own bid represents the fair market value of the parcel. When an appellant fails to provide sufficient evidence and analysis to show error in the decision to overcome BLM's prima facie case, the rejection of the high bid will be affirmed.

If an appellant successfully challenges the basis for BLM'S decision rejecting his high bid, the issue becomes whether his bid represents the fair market value of the lease because absent such a showing the Board cannot order issuance of the lease. If the evidence presented fails to show that the high bid was inadequate, the decision will be set aside and the case remanded to BLM for consideration of the evidence or, if appropriate, a hearing will be ordered. If the evidence is clearly insufficient to establish the adequacy of the bid, BLM's decision will be affirmed.

Suzanne Walsh, 96 IBLA 374 (Apr. 14, 1987)

A decision cancelling a competitive oil and gas lease issued to the high bidder established by tie-breaking bid at a competitive lease sale will be reversed where BLM followed its established procedure for requesting additional bids and there is no evidence of fraud or collusion in the bidding process. An apparent defect in service of notice on one of the tie bidders discovered after lease issuance will not justify cancellation where no timely appeal has been

# OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

taken from refund of the bid deposit and it does not appear from the facts that the ability of the Government to obtain the highest qualified bid has been prejudiced.

Fortune Oil Co., 97 IBLA 85 (Apr. 28, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to appellant to establish that the bid submitted represents fair market value.

Where the record establishes that a number of bids submitted for various parcels of land in a competitive oil and gas lease sale were below BLM's presale estimate of value and that some were accepted while others were not, and no justification for this seemingly disparate treatment has been provided, the Board will set aside a decision rejecting a high bid and remand the case to BLM so that an explanation of the procedures utilized may be provided.

Southern Union Exploration Co., 97 IBLA 275 (May 15, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale when the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market



OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

value, a decision by BLM to reject a bid will be sustained.

Southern Union Exploration Co., 97 IBLA 322 (May 20, 1987)

Mathew Wolf, 98 IBLA 193 (June 29, 1987)

Robert W. Adkins, 103 IBLA 347 (Aug. 10, 1988)

While the Secretary of the Interior has the discretionary authority to reject any or all bids as inadequate, once a decision has been made to accept a bid and this decision has been formally communicated by the authorized officer to the bidder, such discretionary authority has been exercised and the bid may not subsequently be rejected for an alleged inadequacy of the bonus bid.

Where a Notice of Sale of competitive leases expressly notes that a particular parcel will be subject to special stipulations designed to protect big game winter range habitat and the precise nature of the restrictions would be made clear upon inquiry to the State Office as provided by 43 CFR 3120.4-1, an offeror will be deemed to have agreed to accept such stipulation even though it was not specifically described in the Notice of Sale.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to an appellant to establish that the bid submitted represents fair market value.

Viking Resources Corp., 97 IBLA 363 (May 26, 1987)

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. In such cases, a decision rejecting a bid should set forth the basis for rejection with sufficient detail to inform the bidder of the factual basis of the decision and allow the Board to make an informed determination of the correctness of the decision if the decision is disputed on appeal.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. If an appellant demonstrates an error in BLM's calculation of the fair market value, the net effect is to create question as to the underlying fair market value determination. This being the case, an appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value. If an appellant fails to establish this fact, this Board will uphold the Secretary's discretionary authority and affirm the rejection decision.

Burton/Hawks, Inc., 98 IBLA 118 (June 17, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. An appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value.

Read & Stevens, Inc., 98 IBLA 268 (July 10, 1987)

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases where the bid is less than the Government's fair market valuation. Where BLM fails to provide a rational basis for its rejection decision or where the bidder shows that the BLM evaluation is in error, the bidder also has an affirmative obligation to show that the bid it submitted reasonably reflects fair market value in order to be awarded the lease.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the rejection. Where a bid is below the administrative minimum set in the sale notice there is a rational basis for rejection of the bid.

GeoResources, Inc., 99 IBLA 369 (Nov. 4, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The bidder must be provided with an explanation of the factual basis of the decision sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its

OIL AND GAS LEASES--Continued

## COMPETITIVE LEASES--Continued

bid represents fair market value in order to be awarded the lease.

Miller Brothers Oil Corp., 100 IBLA 172 (Dec. 8, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner using the advice of such experts, the decision will not be reversed in the absence of a showing of error.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Victor P. Smith, 101 IBLA 100 (Feb. 2, 1988)

Where the evidence establishes that a high bidder predicated his bid at a competitive oil and gas lease sale upon a BLM memorandum which erroneously reported the amount of funds held in an escrow account attributable to the subject parcel, the Board will rescind the offer and direct BLM to refund appellant's bid deposit.

C. Craig Folson, 101 IBLA 198 (Feb. 22, 1988)

OIL AND GAS LEASES--ContinuedCOMPETITIVE LEASES--Continued

Under the regulations in effect at the time of the decision, BLM was prohibited by 43 CFR 3120.7 from accepting a second highest bid which was less than 80 percent of the rejected high bid.

Tex-Spec Ventures, 103 IBLA 160 (July 21, 1988)

When the Government rejects a competitive oil and gas lease high bid because the bid was less than fair market value, to be awarded the lease, the bidder must not only show error in the BLM valuation, but must also establish that the bid submitted represented fair market value.

Eugene Chmelar, 104 IBLA 301 (Sept. 14, 1988)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Michael Shearn, 104 IBLA 317 (Sept. 20, 1988)

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is a lack of a rational basis of the decision or that BLM erred in formulating its fair market valuation, but he must also establish that his bid

OIL AND GAS LEASES--ContinuedCOMPETITIVE LEASES--Continued

represents fair market value in order to be awarded the lease.

Billy Krumbein, 105 IBLA 76 (Oct. 19, 1988)

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

BLM is not required to prepare an EIS at the lease issuance stage where it adopts a staged leasing program and determines that all post-lease development plans are subject to site-specific environmental review and that development might be limited or denied if such review discloses that unacceptable impacts on other land uses or resources would result. Accordingly, where BLM and the Forest Service nevertheless do prepare an EIS announcing that proposals for actual development of the leases will be subject to further environmental analysis, the Board will not interfere with a decision based on the EIS because of alleged inadequacies therein.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)



OIL AND GAS LEASES--ContinuedCOMPETITIVE LEASES--Continued

Disagreement with BLM's interpretation of relevant geology is insufficient to establish error in a BLM decision to reject a high bid for an oil and gas lease. Such a decision will be affirmed on appeal where error in the decision is not shown and it is not proved that the rejected bid represents fair market value.

Maralo Inc., 110 IBLA 266 (Sept. 12, 1989)

An amended regulation governing payment of the cost of publishing the notice of a competitive oil and gas lease sale may be applied to a pending matter where, absent intervening rights or countervailing public policy reasons, the amended regulation will benefit the affected party.

Alvin L. Terry, Jr., 110 IBLA 360 (Sept. 14, 1989)

Land which is not within a special tar sand area is subject to noncompetitive oil and gas leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), only if the land had been offered for competitive bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was received or the highest bid received was less than the national minimum acceptable bid.

A parcel which was listed for competitive sale but was later withdrawn by BLM is not subject to noncompetitive leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), until the land has been made available for oral bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was submitted or the highest bid received was less than the national minimum acceptable bid.

Robert G. Volkmann, 112 IBLA 5 (Nov. 8, 1989)

CONSENT OF AGENCY

The Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease offer be obtained prior to the issuance of a lease for such land. Where the Corps of Engineers does not consent to

OIL AND GAS LEASES--ContinuedCONSENT OF AGENCY--Continued

lease because its research testing could be affected by a drilling operation, the Department of the Interior is without authority to lease.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), requires that the consent of the administrative agency having jurisdiction over acquired land described in a lease application be obtained prior to the issuance of a lease for such land. Absent consent, the Department of the Interior is without authority to issue a lease.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

When approving applications for permit to drill on an existing acquired lands oil and gas lease, BLM may properly impose seasonal restriction stipulations on drilling in order to protect an endangered species of bird and, at the behest of the surface managing agency, to preclude drilling during the flood season.

Prado Petroleum Co., 103 IBLA 247 (July 26, 1988)

OIL AND GAS LEASES--ContinuedCONSOLIDATION

A decision denying a request for consolidation of oil and gas leases will be affirmed on appeal where the applicants have failed to show that consolidation would be in the interests of conservation.

Marathon Oil Co., Celeste Grynberg, 97 IBLA 102 (Apr. 29, 1987)

DESCRIPTION OF LAND

A noncompetitive oil and gas lease offer for acquired land not within the area of the public land surveys may properly describe the land in the offer by metes and bounds giving the course and distance between successive angle points on the boundary of the tract.

An oil and gas lease offer is considered to be an offer to lease any and all lands described therein. The fact that part of a tract of land described in an oil and gas lease offer is unavailable for leasing does not ordinarily require rejection of the entire lease offer.

Bruce Anderson, 85 IBLA 270 (Mar. 6, 1985)

An oil and gas lease offer for surveyed land or land within a protracted survey must describe the land by legal subdivision, section, township, and range. An offer which fails to describe the land by section is defective and, therefore, properly rejected.

Isabelle C. Chang, 86 IBLA 129 (Apr. 19, 1985)

BLM is not required to alter, modify, or correct an over-the-counter oil and gas lease offer in order to provide an acceptable description of land to be entered on the offer.

John T. Bukant, 88 IBLA 51 (July 15, 1985)

OIL AND GAS LEASES--ContinuedDESCRIPTION OF LAND--Continued

Under 43 CFR 3101.1-4(a) (1981), the failure to designate a meridian is not a fatal defect in the land description in a noncompetitive oil and gas lease offer for acquired lands, where the description, on its face, unambiguously delimits the land requested and BLM does not have to go outside the offer form itself to determine exactly what lands the offer describes.

Beard Oil Co., 88 IBLA 268 (Sept. 4, 1985)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter lease offer for acquired lands which correctly describes the lands as described in the Declaration of Taking, but includes a description of the land by course and distance which is incorrect, is properly rejected since the incorrect description renders the face of the offer subject to corrections absent which the lease could not issue.

Henry P. Ellsworth, 97 IBLA 74 (Apr. 28, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent

OIL AND GAS LEASES--Continued

## DESCRIPTION OF LAND--Continued

ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

An offer to lease a tract of land for oil and gas constitutes an offer to lease any and all of the lands described therein which are available for leasing. Where a lease offer describes a tract of acquired land outside the area of the public land surveys, part of which is unavailable for leasing, a decision of BLM requiring an oil and gas lease offeror to provide a metes and bounds description of those lands available for leasing will be affirmed. The filing of such a description does not alter the priority of the lease offer.

Bruce Anderson, 101 IBLA 366 (Mar. 29, 1988)

The terms of a noncompetitive over-the-counter oil and gas lease offer for public domain lands (Form 3100-11) provide that the offeror offers to lease "all or any" of the lands described on the offer that are available for lease. Under 43 CFR 3111.1-1(e), BLM is expressly empowered to accept over-the-counter non-competitive offers either "in whole or in part." In operation, BLM construes an over-the-counter oil and gas lease offer to include all available land in the tract described in the offer. After unavailable lands are rejected from the offer, the balance is properly leased. When BLM's authorized officer signs the lease forms, the offer is accepted in part, and a binding lease is created for the lands that were available for leasing, so that the offeror becomes liable for rental on the lease lands.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

OIL AND GAS LEASES--Continued

## DESCRIPTION OF LAND--Continued

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close, is properly subject to rejection. The incorrect description renders the face of the offer subject to corrections absent which a lease could not issue.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

A party making an over-the-counter oil and gas lease offer for land not surveyed under the rectangular system of the public land survey is required to provide a description of the land for which the offer is made as stated in 43 CFR 3111.2-2(b). It is the responsibility of the Bureau of Land Management to satisfy itself that the land described in the offer is available for leasing and that the lease may properly be issued.

Beard Oil Co., 103 IBLA 251 (July 27, 1988)

An oil and gas lease offer for an unsurveyed island, which simply described a portion of a navigable lake which may have contained the island sought, did not comply with 43 CFR 3111.2-1(b), because the offer failed to describe the desired land by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract and tied to an official corner of the public land survey.

Frederic Alan Maxwell, 105 IBLA 341 (Nov. 14, 1988)



OIL AND GAS LEASES--ContinuedDESCRIPTION OF LAND--Continued

A noncompetitive oil and gas lease offer for acquired lands may properly describe the requested lands by acquisition tract number assigned by the acquiring agency, in accordance with 43 CFR 3111.2-2(c), where the land has not been surveyed under the rectangular system of public land surveys. Any additional description of the land which is correct and does not create ambiguity as to the land sought will not render the offer defective.

Bernard Silver, 107 IBLA 68 (Jan. 30, 1989)

DISCOVERY

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Exxon Co., U.S.A., 85 IBLA 135 (Feb. 19, 1985)

Burton/Hawks, Inc., 85 IBLA 193 (Feb. 27, 1985)

Michael Shearn, 87 IBLA 168 (June 13, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning

OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Dan Nelson, 85 IBLA 156 (Feb. 25, 1985)

Howell Spear, 86 IBLA 8 (Mar. 29, 1985)

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to reveal sufficient data in support of the decision to reject such bid, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid.

Suzanne Walsh, 86 IBLA 83 (Apr. 11, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

Where a competitive oil and gas lease high bid is not clearly spurious or unreasonable on its face and the record fails to disclose a sufficient factual basis for the conclusion that the bid is inadequate, the decision will be set aside and the case remanded for compilation of a more complete record and readjudication of the bid. A record that does not reveal the estimated minimum acceptable value for a parcel and sufficient factual data to establish its prima facie correctness cannot support rejection of the high bid for the parcel.

Yates Petroleum Corp., 86 IBLA 252 (May 2, 1985)

The rejection of the high bid for an oil and gas lease offered at a competitive lease sale will be affirmed where the administrative record shows that the much higher value of the parcel set by BLM was the product of careful and reasoned analysis, and appellant neither demonstrates error in BLM's appraisal nor establishes that his bid accurately reflects the actual fair market value.

J. W. McTiernan, 87 IBLA 76 (May 28, 1985)

Where a decision to reject a competitive oil and gas lease sale high bid has been made in a careful and systematic manner utilizing the advice of Departmental experts and the record discloses a rational basis for the conclusion that the bid is inadequate, such a decision will not be overturned on appeal.

Petrovest, Inc., 88 IBLA 166 (Aug. 19, 1985)

Where the record or appeal establishes uncertainty of Federal title to a tract of land and its mineral deposits, the appellant has failed to carry his burden on appeal and there is sufficient ground for rejection of an oil and gas lease offer in the exercise of the Secretary's discretionary authority over leasing.

David A. Province, 89 IBLA 154 (Oct. 4, 1985)

OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE--Continued

Noncompetitive oil and gas lease offers for acquired lands in Michigan were rejected because the mineral estates were reserved when the land was conveyed to the United States. Where the offeror subsequently fails, on appeal, to provide any evidence to show rights to the oil and gas deposits have since vested in the United States by operation of law, the lease offers were properly rejected.

PMG, 90 IBLA 60 (Dec. 10, 1985)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale. A BLM decision rejecting a high bid as inadequate will be affirmed if appellant fails to overcome the Government's prima facie showing of correctness of its estimated minimum acceptable fair market value for the parcel and establish that appellant's bid reasonably reflects fair market value.

Suzanne Walsh, 91 IBLA 119 (Mar. 17, 1986)

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and where appellant fails to establish that its bid reasonably reflects fair market value.

Billy Krumbein, 92 IBLA 362 (June 30, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

Read & Stevens, Inc., 93 IBLA 61 (July 15, 1986)

Read & Stevens, Inc., 93 IBLA 84 (July 16, 1986)

OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE--Continued

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

When BLM rejects a high bid in a competitive oil and gas lease sale as inadequate and the decision is appealed and later referred for a hearing, at the hearing BLM bears the burden of going forward to establish a prima facie case by showing the prima facie correctness of its minimum acceptable bid value. However, the ultimate burden of persuasion always rests with the competitive high bidder who must show by a preponderance of the evidence not only that BLM's minimum acceptable bid value is erroneous, but also affirmatively show that its high bid correctly reflects the fair market value of the parcel.

Harold Green v. Bureau of Land Management, 93 IBLA 237 (Aug. 22, 1986)

A BLM decision rejecting a high bid in a competitive oil and gas lease sale as inadequate will be affirmed if the record indicates the decision has been made in a careful and systematic manner utilizing the advice of the experts employed by the Department for making such determinations. A showing of a rational basis for the conclusion that the highest bid does not represent fair market value is sufficient.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic



# OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

manner utilizing the advice of such experts, the decision will not be reversed in the absence of a showing of error.

I. K. Rosen, 94 IBLA 202 (Nov. 4, 1986)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner utilizing the advice of such experts, the decision will not be reversed, even though the determination may be subject to reasonable differences of opinion, notwithstanding any immaterial defects in BLM's analysis, where an appellant fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value.

Suzanne Walsh, 94 IBLA 249 (Nov. 13, 1986)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Once BLM establishes the prima facie correctness of its presale evaluation, a party appealing from rejection of its high bid must not only show error in the Government's evaluation, it must also affirmatively establish that its bid represents fair market value.

Harris-Headrick, 95 IBLA 124 (Jan. 6, 1987)

# OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

The Board will affirm a BLM decision rejecting a high bid for a competitive oil and gas lease where the appellant fails to overcome, by a preponderance of the evidence, BLM's prima facie showing of the accuracy of its estimated fair market value for the offered parcel and fails to establish that its bid reasonably reflects fair market value.

MTS Limited Partnership, 95 IBLA 337 (Jan. 30, 1987)

Michael Shearn, 96 IBLA 13 (Feb. 26, 1987)

Suzanne Walsh, 98 IBLA 213 (July 1, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to appellant to establish that the bid submitted represents fair market value.

Where the record establishes that a number of bids submitted for various parcels of land in a competitive oil and gas lease sale were below BLM's presale estimate of value and that some were accepted while others were not, and no justification for this seemingly disparate treatment has been provided, the Board will set aside a decision rejecting a high bid and remand the case to BLM so that an explanation of the procedures utilized may be provided.

Southern Union Exploration Co., 97 IBLA 275 (May 15, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale when the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When an appellant

OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE--Continued

fails to meet its affirmative obligation to establish that its bid is a reasonable reflection of fair market value, a decision by BLM to reject a bid will be sustained.

Southern Union Exploration Co., 97 IBLA 322 (May 20, 1987)

Mathew Wolf, 98 IBLA 193 (June 29, 1987)

Robert W. Adkins, 103 IBLA 347 (Aug. 10, 1988)

While the Secretary of the Interior has the discretionary authority to reject any or all bids as inadequate, once a decision has been made to accept a bid and this decision has been formally communicated by the authorized officer to the bidder, such discretionary authority has been exercised and the bid may not subsequently be rejected for an alleged inadequacy of the bonus bid.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

Where, in the adjudication of an appeal from a decision of BLM rejecting a high bid for a competitive oil and gas lease as inadequate, BLM establishes a rational basis for its determination, the burden of proof shifts to an appellant to establish that the bid submitted represents fair market value.

Viking Resources Corp., 97 IBLA 363 (May 26, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. In such cases, a decision rejecting a bid should set forth the basis for rejection with sufficient detail to inform the bidder of the factual basis of the decision and allow the

OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE--Continued

Board to make an informed determination of the correctness of the decision if the decision is disputed on appeal.

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. If an appellant demonstrates an error in BLM's calculation of the fair market value, the net effect is to create question as to the underlying fair market value determination. This being the case, an appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value. If an appellant fails to establish this fact, this Board will uphold the Secretary's discretionary authority and affirm the rejection decision.

Burton/Hawks, Inc., 98 IBLA 118 (June 17, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases if he has reason to believe the bid price is less than the fair market value. If BLM supports the rejection with sufficient evidence to demonstrate a rational basis for its decision, an appellant must show BLM has erred when formulating the fair market value. An appellant also has an affirmative obligation to establish that the bid it submitted is a reasonable reflection of the fair market value.

Read & Stevens, Inc., 98 IBLA 268 (July 10, 1987)

The Secretary has discretionary authority to reject a high bid for a tract offered at a competitive sale of oil and gas leases where the bid is less than the Government's fair market valuation. Where BLM fails to provide a rational basis for its rejection decision or where the bidder shows that the BLM evaluation is in error, the bidder also has an affirmative obligation to show that the bid it

# OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

submitted reasonably reflects fair market value in order to be awarded the lease.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale where the record discloses a rational basis for the rejection. Where a bid is below the administrative minimum set in the sale notice, there is a rational basis for rejection of the bid.

GeoResources, Inc., 99 IBLA 369 (Nov. 4, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The bidder must be provided with an explanation of the factual basis of the decision sufficient for the Board to determine the correctness of the decision if disputed on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is the lack of a rational basis for the decision or that BLM erred when formulating its fair market valuation, but must also establish that its bid represents fair market value in order to be awarded the lease.

Miller Brothers Oil Corp., 100 IBLA 172 (Dec. 8, 1987)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision if disputed on appeal.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning

# OIL AND GAS LEASES--Continued

## DISCRETION TO LEASE--Continued

geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. Where a decision to reject a bid has been made in a careful and systematic manner using the advice of such experts, the decision will not be reversed in the absence of a showing of error.

Victor P. Smith, 101 IBLA 100 (Feb. 2, 1988)

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. Where oil and gas leases were inadvertently issued for lands that had been designated by Congress as wilderness before issuance of the lease, the Bureau of Land Management properly cancels the lease as to those lands.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

When the Government rejects a competitive oil and gas lease high bid because the bid was less than fair market value, to be awarded the lease, the bidder must not only show error in the BLM valuation, but must also establish that the bid submitted represented fair market value.

Eugene Chmelar, 104 IBLA 301 (Sept. 14, 1988)

The Secretary of the Interior has the discretionary authority to reject a high bid in a competitive oil and gas lease sale if the record discloses a rational basis for the conclusion that the amount of the bid was inadequate. The explanation provided must inform the bidder of the factual basis of the decision and must be sufficient for the Board to determine the correctness of the decision on appeal.

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show the lack of a rational basis for the decision, or that BLM erred when formulating its fair market valuation,



OIL AND GAS LEASES--ContinuedDISCRETION TO LEASE--Continued

but must also establish that its bid represents fair market value in order to be awarded the lease.

Michael Shearn, 104 IBLA 317 (Sept. 20, 1988)

When the Government rejects a competitive oil and gas lease high bid because the bid was less than its fair market valuation, the bidder must not only show that there is a lack of a rational basis of the decision or that BLM erred in formulating its fair market valuation, but he must also establish that his bid represents fair market value in order to be awarded the lease.

Billy Krumbein, 105 IBLA 76 (Oct. 19, 1988)

Disagreement with BLM's interpretation of relevant geology is insufficient to establish error in a BLM decision to reject a high bid for an oil and gas lease. Such a decision will be affirmed on appeal where error in the decision is not shown and it is not proved that the rejected bid represents fair market value.

Maralo Inc., 110 IBLA 266 (Sept. 12, 1989)

DRAINAGE

Where Geological Survey decides to deviate from a straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)  
93 I.D. 95

OIL AND GAS LEASES--ContinuedDRAINAGE--Continued

BLM may properly provide for the assessment of compensatory royalty pursuant to 43 CFR 3162.2(a) where an oil and gas lessee fails to drill a well to protect the lessor from loss of royalty due to drainage, and the lessee has failed to demonstrate that the quantity of oil or gas underlying the lease which would be lost by drainage is not sufficient to pay the cost of drilling and operating the well at a reasonable profit.

When the record supports a conclusion that drainage is occurring, but also indicates BLM's intent to have a lessee pay compensatory royalties, regardless of whether or not a paying productive well can be drilled, the decision will be vacated and the case remanded to BLM to provide appellant an opportunity to submit evidence that a prudent operator would not drill a protective well.

Gulf Oil Exploration & Production Co., 94 IBLA 364  
(Dec. 4, 1986)

Compensatory royalties for failure to protect against drainage commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. Such notice may be given by BLM or by a third party. If BLM can show that a lessee knew or a reasonably prudent operator would have known that drainage was occurring, the requirement of notice is satisfied.

CSX Oil & Gas Corp., G. J. Morgan, 104 IBLA 188  
(Sept. 9, 1988) 95 I.D. 148

Under the usual statement of the standard for prudent operation there is no obligation upon the lessee to drill an offset well unless there is a sufficient quantity of oil and gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. When BLM has established that a leased Federal tract is being drained by a well operated by a common lessee, it need not prove as a part of its cause of action that a protective well would be economic. In such cases,

# OIL AND GAS LEASES--Continued

## DRAINAGE--Continued

the burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

Compensatory royalties commence upon passage of a reasonable time following notice to the lessee that drainage is occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the common lessee knew or that a reasonably prudent operator should have known that drainage was occurring. The common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to notice of drainage.

If the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas, there would be no breach of a lessee's duty to prevent drainage. However, if a lessee can make a reasonable profit by drilling the well, he should drill. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the offset well were not drilled.

Atlantic Richfield Co., 105 IBLA 218 (Nov. 2, 1988) 95 I.D. 235

A BLM decision requiring an oil and gas lessee to pay compensatory royalty for drainage resulting from an adjacent well will be set aside and the case remanded to BLM where BLM assessed royalty from the date of first production of the well, rather than from a reasonable time following notice to the lessee.

Chevron U.S.A. Inc., 107 IBLA 126 (Feb. 6, 1989)

# OIL AND GAS LEASES--Continued

## DRAINAGE--Continued

The prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas that it drained from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

Atlantic Richfield Co. (On Reconsideration), 110 IBLA 200 (Aug. 21, 1989) 96 I.D. 363

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Unleased Federal lands determined to be productive in paying quantities as part of a unitization plan may not be considered "unitized" to protect the uncommitted land from drainage.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

Compensatory royalties accrue after the passage of a reasonable time following the date the lessee knew or should have known that drainage was occurring. In a common lessee context, the lessee who drills the offending well is in the best position to know that drainage is occurring. In such case BLM need not assume the initial burden of showing that the lessee knew or that a reasonably prudent operator should have known that drainage was occurring, as the common lessee is presumed to have knowledge of the drainage upon first production from its offending well. This presumption is rebuttable by the common lessee, who bears the ultimate burden of persuasion as to date he had notice that drainage was occurring.

Under the usual statement of the standard for prudent operation, the lessee is not obligated to drill

OIL AND GAS LEASES--ContinuedDRAINAGE--Continued

an offset well unless there is a sufficient quantity of oil or gas to pay a reasonable profit to the lessee over and above the cost of drilling and operating the well. The prudent operator standard applies to situations in which a leased Federal tract is being drained by a well operated by a common lessee. In such cases, BLM has the burden of establishing that the leased Federal tract is being drained by the common lessee's non-Federal well, but need not prove as a part of its cause of action that a protective well would be economic. The burden of producing evidence and the ultimate burden of persuasion on this issue rest with the common lessee.

No breach of a lessee's duty to prevent drainage will occur if the cost of drilling and operating an offset well is greater than the value of the recovered oil and/or gas. However, if a lessee can make a reasonable profit by drilling the well, he has a duty to prevent drainage by either drilling a well or unitizing the drained area. The prudent operator test is applied looking to the reasonably anticipatable recovery from the offset well, rather than the oil and/or gas which would be lost if the well were not drilled.

Cordillera Corp., 111 IBLA 61 (Sept. 20, 1989)

DRILLING

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, of no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

OIL AND GAS LEASES--ContinuedDRILLING--Continued

Approval of an application for a permit to drill has been identified by the Department as an action categorically excluded from the provisions of the National Environmental Policy Act requiring preparation of an environmental assessment (EA) or environmental impact statement (EIS). However, in exceptional circumstances approval of an application for a permit to drill raises sufficient concern to warrant the preparation of an EA. An EA is proper when there is reason to believe the proposed action might pose a threat to a threatened or endangered species.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

The proximity of the proposed action to national park lands is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. When the official having responsibility for managing parklands near the site of the proposed action expresses an opinion that the proposed action may or will adversely affect the park ecosystem, that opinion should be afforded substantial weight in the EA.

The degree to which the proposed action may be considered as highly controversial is a material factor to be considered in the analysis of the intensity or severity of the impact of the proposed action on the human environment. However, the mere fact that persons or organizations oppose the proposed action does not per se render the action "highly controversial," as the term properly refers to cases where a substantial dispute exists as to the size, nature, or effect of the



OIL AND GAS LEASES--ContinuedDRILLING--Continued

action. Even when certain aspects of a proposed action may be deemed highly controversial, an EIS need not be prepared if the effects giving rise to the controversy have been adequately mitigated.

Connected action must be considered to be a part of the proposed action when determining whether a proposed action will have a significant effect on the human environment. Connected actions include those which: (i) automatically trigger other actions which may require an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.

When making a determination whether a proposed action will have a significant effect on the human environment, the cumulative effect of the proposed action and other actions not connected with the proposed action must be taken into consideration, even though, individually, the actions may be deemed insignificant. However, the possible impact of a speculative future action need not be considered when it can reasonably be assumed that such future action will not take place, or, if it will take place, an EA will be completed prior to a decision to take such action.

The adverse effects of a proposed action may be reduced to a point where they no longer have a significant impact upon the human environment by the implementation of mitigating measures. However, the agency imposing such additional requirements deemed necessary to mitigate the adverse effect of the proposed action must have the authority to enforce compliance with the mitigating measures imposed.

When it has been determined a proposed action is located in an area occupied by a species identified as being threatened or endangered, the Department is required by 16 U.S.C. § 1536(a)(2) (1982) to assure any action authorized by it is not likely to jeopardize the continued existence of the threatened or endangered species or result in the adverse modification of the critical habitat of such species, or seek an exemption pursuant to 16 U.S.C. § 1536(h) (1982). If a determination that approval of an application for a permit to drill an oil and gas well will result in "no jeopardy" is based upon the implementation of certain mitigating measures, the application for permission to drill may

OIL AND GAS LEASES--ContinuedDRILLING--Continued

be approved only after it has been determined that the mitigating measures can be imposed upon necessary parties.

When a finding that no significant impact will result from construction of a road to a drillsite is critically dependent upon the location of that road along a route avoiding critical habitat of a threatened or endangered species, a stipulation to the application for a permit to drill allowing the road to be relocated to avoid destruction of a cultural resource value is in conflict with the basis for determination that no significant impact will occur. The cultural resource stipulation must be amended to prohibit relocation of the road or require a supplemental EA prior to relocating the road.

Glacier-Two Medicine Alliance et al., 88 IBLA 133 (Aug. 9, 1985)

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed, requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

OIL AND GAS LEASES--ContinuedDRILLING--Continued

Even when the doctrine of commercial impracticability is applicable, it may be invoked only where a party first establishes the factual basis for doing so. Therefore, where a unit operator fails to establish the necessary facts, the Board will decline to determine whether or not, in the proper circumstances, commercial impracticability could serve to waive diligent drilling requirements as set forth in a unit agreement.

Koch Exploration Co., 100 IBLA 352 (Jan. 12, 1988)

The Board will affirm BLM's decision approving an application for permit to drill where that approval was based upon an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment, and where that approval was conditioned upon the operator's preparation of an acceptable contingency plan for the protection of individuals endangered by a potential emergency.

Elberta M. Taylor et al., 102 IBLA 372 (June 14, 1988)

When approving applications for permit to drill on an existing acquired lands oil and gas lease, BLM may properly impose seasonal restriction stipulations on drilling in order to protect an endangered species of bird and, at the behest of the surface managing agency, to preclude drilling during the flood season.

Prado Petroleum Co., 103 IBLA 247 (July 26, 1988)

Any party adversely affected by a decision of the Bureau of Land Management on an application for a permit to drill under 43 CFR 3162.3-1 may request administrative review by the State Director of the Bureau of Land Management in accordance with 43 CFR 3165.3(b). Any party adversely affected by the decision of the State Director under 43 CFR 3165.3(b) may appeal that decision to the Board of Land Appeals.

San Juan Citizens Alliance, 104 IBLA 288 (Sept. 14, 1988)

OIL AND GAS LEASES--ContinuedDRILLING--Continued

A BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument will be reversed where, in the course of its assessment of the environmental impact of proposed drilling and associated road improvement activity, BLM failed to consider the potential cumulative impact of such activity in conjunction with other existing and proposed drilling and production of wells and associated road improvement activity within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The categorical exclusion found at 516 DM 6, Appendix 5.4D(2)(d), exempting APD approval from the NEPA process, applies only to exploratory wells and not to development wells.

Where an environmental assessment prepared for consideration of an APD is deficient in its discussion of possible effects of the proposed action on wildlife, fails to discuss relevant mitigation measures, and does not document the reasons why it rejects various alternatives to the proposed action, approval of the APD based on such an environmental assessment must be set aside.

Under the decision of the Court of Appeals for the Tenth Circuit in Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609 (1987), where an initial exploratory well has been successfully drilled and a lessee files an APD for additional development wells, the filing of the APD triggers the requirement for an Environmental Impact Statement, unless an Environmental Impact Statement has already been prepared which analyzes the impacts that can be expected from full field development.

Michael Gold et al., 108 IBLA 231 (Apr. 24, 1989)

## OIL AND GAS LEASES--Continued

### DRILLING--Continued

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

### EXPIRATION

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is

## OIL AND GAS LEASES--Continued

### EXPIRATION--Continued

not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 46 (May 9, 1986)

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)



OIL AND GAS LEASES--ContinuedEXPIRATION--Continued

"production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. Such a well must be in physical condition to produce and is not in such condition if the casing has not been perforated.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration),  
100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

Where an oil and gas lease is eliminated from a unit and receives an extension of its term for 2 years and so long thereafter as oil or gas is produced in paying quantities, the lease will expire at the end of that 2-year period unless there is a well located on the lease which is capable of producing oil or gas in paying quantities.

J. M. Huber Corp., 106 IBLA 23 (Dec. 6, 1988)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

OIL AND GAS LEASES--ContinuedEXTENSIONS

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1, to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, of no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

Where the record shows that at the end of the primary term of an oil and gas lease, there is no production of oil or gas in paying quantities from the lease area, and no well capable of such production, the lease expires at the end of its term in the absence of diligent drilling operations initiated prior to the expiration or suspension of the lease.

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand),  
88 IBLA 172 (Aug. 20, 1985)

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than

# OIL AND GAS LEASES--Continued

## EXTENSIONS--Continued

2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Wexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 46 (May 9, 1986)

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(j) (1982), the segregated nonunitized lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986)  
93 I.D. 246

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143  
(July 30, 1986)

# OIL AND GAS LEASES--Continued

## EXTENSIONS--Continued

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

Where a lease committed in part to a unit agreement is extended by reason of production at the time of commitment, the segregated nonunitized lease is extended for the life of such production but not less than 2 years from the date of segregation pursuant to sec. 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1982).

Anadarko Production Co., 96 IBLA 320 (Apr. 7, 1987)  
94 I.D. 129

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way

OIL AND GAS LEASES--ContinuedEXTENSIONS--Continued

would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

The Secretary of the Interior is authorized to suspend oil and gas leases in the interest of conservation where action cannot be taken on an application because of the time needed to comply with requirements of the National Environmental Policy Act of 1969. Where the lessee's inability to commence drilling prior to lease expiration cannot be attributed to any order, delay, or inaction by any Federal agency, the Secretary is not obligated to grant a suspension but has the discretion to do so in the exercise of his informed discretion upon a finding that it is in the interest of conservation.

John March, 98 IBLA 143 (June 22, 1987)

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

The Secretary of the Interior has the discretionary authority to suspend an oil and gas lease in the interest of conservation where drilling under prevailing conditions would damage the lease environment. Although a suspension of operations may be granted retroactively after the lease expiration date, a prerequisite is an application filed prior to the expiration of the lease. In the absence of a timely

OIL AND GAS LEASES--ContinuedEXTENSIONS--Continued

filed application, there is no lease in existence which may be suspended.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

Under 30 U.S.C. § 226(j) (1982), any lease partially committed to a unit plan shall be segregated into separate leases as to the lands committed and the lands not committed. Thereafter, they are distinct leases, and are administered independently of each other. The statute does not give the segregated non-unitized portion of a lease a new term, but provides that the lease shall continue in force and effect for the term thereof, but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The word "term" here refers to the entire term of the lease, i.e., the period the lease has to run, whether that period were definite or indefinite, as it existed on the date of segregation.

Under 30 U.S.C. § 226(j) (1982), any lease which shall be eliminated from any approved unit plan and any lease which shall be in effect at the termination of such a plan shall continue in effect for the original term thereof, but for not less than 2 years, and so long thereafter as oil or gas is produced in paying no quantities. This provision is mandatory and leaves no room for the exercise of discretion. It applies to any lease eliminated from a unit plan without exception.

If a lease is no longer in its original term, but is held by production at the time of its elimination from a unit, it continues under 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53 (Sept. 8, 1987) 94 I.D. 394



OIL AND GAS LEASES--ContinuedEXTENSIONS--Continued

An oil and gas lease created by a partial assignment during the primary term of the original lease is entitled to a 2-year continuation dating from discovery of oil or gas in paying quantities on any other segregated portion of the original lease, regardless of whether the discovery occurred prior to or after the effective date of the assignment.

JSC Producers, 99 IBLA 164 (Oct. 2, 1987)

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

Where a lease achieves a discovery of oil or gas in paying quantities during the third year of its primary term and a partial assignment of this lease occurs during its tenth year, 30 U.S.C. § 187a (1982), does not provide a basis for extending the undeveloped assigned lease segregated by such assignment.

Fuel Resources Development Co., 100 IBLA 37 (Nov. 19, 1987)

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit

OIL AND GAS LEASES--ContinuedEXTENSIONS--Continued

well capable of producing oil or gas in paying quantities. Such a well must be in physical condition to produce and is not in such condition if the casing has not been perforated.

A lessee's reliance upon the erroneous statements of a BLM employee does not estop the Department from denying an extension of an oil and gas lease if the lease did not qualify for an extension under the Mineral Leasing Act.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

An oil and gas lease on which there exists a well capable of production in paying quantities on the expiration date of the lease will not expire for lack of production unless the lessee is allowed a reasonable time (at least 60 days) after notice in which to place the well in a producing status.

In order to establish a well capable of producing oil or gas in paying quantities which will extend the term of an oil and gas lease beyond the expiration date, the record must show the existence of a well which is actually in a condition to produce at the time in question. A decision holding a lease to have expired will be affirmed where it is clear from a flow test conducted on the lease expiration date that the well is not capable of production in the absence of reworking operations.

In determining the existence of a well capable of production in paying quantities as of the lease expiration date, the present status of the well is properly distinguished from potential for production. The results of a flow test conducted on the expiration date of the lease will ordinarily be dispositive of the issue. Results obtained in reworking operations conducted after the lease expiration date are not relevant to the status of the well at the critical date.

Amoco Production Co., 101 IBLA 215 (Feb. 26, 1988)

OIL AND GAS LEASES--ContinuedEXTENSIONS--Continued

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

FIRST-QUALIFIED APPLICANT

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

Failure of an applicant to date a simultaneous oil and gas lease application in accordance with 43 CFR 3112.2-1(c) (1982) does not require rejection of the application, where it is shown that the application was in fact signed during the filing period.

Ruth C. Bezirum, 86 IBLA 29 (Apr. 3, 1985)

The Secretary of the Interior has the authority to cancel by administrative decision a noncompetitive oil and gas lease which was invalid at its inception because it issued to a party other than the first-qualified applicant in violation of statute and Departmental regulations.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

OIL AND GAS LEASES--ContinuedFIRST-QUALIFIED APPLICANT--Continued

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond G. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

Where an over-the-counter lease offer is defective as filed, the offer receives no priority until the defect is cured.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

The failure to date the signature on an over-the-counter oil and gas lease offer is not a per se disqualification of the offeror and a decision rejecting an offer on this basis is properly reversed.

Henry W. Odlozil, Sr., 96 IBLA 286 (Mar. 30, 1987)

Lands that are already included in a valid, outstanding oil and gas lease are not subject to being leased again, and BLM properly rejects any over-the-counter offer insofar as it covers lands included in the outstanding lease.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

# OIL AND GAS LEASES--Continued

## FIRST-QUALIFIED APPLICANT--Continued

A junior over-the-counter noncompetitive oil and gas lease offer is properly rejected when the lands have been leased to a senior offeror, and the junior offeror fails to show valid reasons why the senior offer is defective.

Joe N. Johnson, 103 IBLA 5 (June 22, 1988)

When BLM decides to issue a noncompetitive oil and gas lease, it is required to issue the lease to the person first making application for the lease if that person is qualified to hold a lease. Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Sec. 1274.14 of the BLM Manual sets out binding Bureau policy on how to time and date stamp documents, including over-the-counter lease offers received through the U.S. Postal Service or commercial delivery service, and BLM decisions affording priority on the basis of this policy will be affirmed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through the U.S. Postal Service shall be time and date stamped as of the time and date of receipt, with the sole exception that any offer received in the first scheduled receipt of mail during the business day is properly time and date stamped as of the posted beginning hour for the day. In the absence of proof that an offer was in fact received by BLM in the first scheduled receipt of mail, BLM's action to time and date stamp the offer as of the time it was received will not be disturbed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through a commercial delivery source shall be time and date stamped as of the time and date it is actually received.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

# OIL AND GAS LEASES--Continued

## FUTURE AND FRACTIONAL INTEREST LEASES

An application for a noncompetitive future interest oil and gas lease is properly rejected where the land applied for is known to contain mineral deposits or is within the known geologic structure of a producing oil or gas field.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set aside and the casefile remanded to BLM for a determination regarding the proper qualification of the first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

Issuance of a future interest lease pursuant to sec. 5 of the Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. § 354 (1982), is authorized where an application is filed by a party holding all or substantially all of the present operating rights to the mineral deposits title to which will subsequently become vested in the United States. Continuity of the term of the leasehold interest is the objective of the regulations implementing this requirement, and a decision rejecting an application for failure to control substantially all of the present operating rights may be reversed where appellant has shown that its interest in the operating rights was for all practical purposes coextensive with the duration of the reserved mineral rights.

The Moran Corp., 101 IBLA 384 (Mar. 31, 1988)



OIL AND GAS LEASES--ContinuedFUTURE AND FRACTIONAL INTEREST LEASES--Continued

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

A decision to reject an offer for a future interest oil and gas lease on the basis of a conflicting future interest lease may be set aside where the offer was accompanied by evidence of the offeror's title to the present operating rights as required by regulation at 43 CFR 3111.3-2 (1987), which evidence included a release executed by the conflicting lessee as required by the terms of the supplemental agreement to the future interest lease.

Alamo Exploration Co., 108 IBLA 262 (Apr. 25, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

OIL AND GAS LEASES--ContinuedFUTURE AND FRACTIONAL INTEREST LEASES--Continued

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

Beard Oil Co., 111 IBLA 191 (Oct. 10, 1989)

INCIDENTS OF NONCOMPLIANCE

The Bureau of Land Management may properly issue a notice of an incident of noncompliance with 43 CFR 3162.4-3, requiring the filing of a monthly report of operations for each calendar month, beginning with the month in which drilling operations were initiated.

Somont Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

Departmental regulation 43 CFR 3162.7-4(d)(1) (1984) required site facility diagrams to be filed within 30 days after new measurement facilities were installed or existing facilities were modified, and one who failed to file the required diagram was subject to a \$100 assessment under 43 CFR 3163.3(h) (1984). However, an assessment for violating this provision will be reversed if an appellant establishes that installation of the equipment had not been completed more than 30 days prior to issuance of the notice of incident of noncompliance.

Fuel Resources Development Co., 91 IBLA 242 (Apr. 8, 1986)

A party challenging the factual basis for a written incident of noncompliance bears the burden of establishing by a preponderance of the evidence that conditions were not as stated on the face of the document.

An oil and gas lease operator has not complied with 43 CFR 3162.7(b)(6), requiring a storage area to

OIL AND GAS LEASES--ContinuedINCIDENTS OF NONCOMPLIANCE--Continued

be properly identified, if the identification sign does not bear the lease number. A sign affixed to a nearby operating well in accordance with 43 CFR 3162.6 does not satisfy 43 CFR 3162.7(b)(6).

An incident of noncompliance for failure to timely reclaim a working pit pursuant to a written order from BLM has not occurred where the Application for Permit to Drill states the pit is to be allowed to "dry out" before reclamation and evidence indicates the pit was saturated with fluids when the notice of an incident of noncompliance was issued.

Where evidence is presented by the appellant to overcome the presumption that the facts are correctly stated on a notice of an incident of noncompliance for operations conducted under an oil and gas lease and the record does not sufficiently support BLM's determination to issue the notice, the determination will be set aside.

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

OIL AND GAS LEASES--ContinuedINCIDENTS OF NONCOMPLIANCE--Continued

BLM may properly render an assessment of \$250 under 43 CFR 3163.3(a) against a unit operator who fails to comply with a written order to submit site-facility diagrams for all facilities located on lands subject to a unit agreement approved by the Department's authorized officer, whether those facilities are located on private, Federal, or Indian leases. The \$250 assessment for noncompliance with BLM's written order is a one-time charge per violation under 43 CFR 3163.3.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

A BLM decision to assess liquidated damages and civil penalties for failure to comply with a written order of an authorized BLM officer will be reversed where the record does not establish that the lessee was served with the order prior to the assessment of liquidated damages pursuant to 43 CFR 3163.3(a) and prior to the assessment of civil penalties pursuant to 43 CFR 3163.4-1.

Robert C. Anderson Oil Properties, 98 IBLA 82 (June 10, 1987)

On appeal from an assessment for failure to timely abate an incident of noncompliance (INC), the assessment will be affirmed where the INC is found to be proper and it is undisputed the operator did not achieve compliance within the time allowed. An inquiry of the Bureau of Land Management regarding the propriety of the INC will not ordinarily justify a failure to timely abate in the absence of a timely request for administrative review of the INC coupled with a request for suspension or a request for extension of time to comply.

Timberline Production Co., 98 IBLA 188 (June 26, 1987)

OIL AND GAS LEASES--ContinuedINCIDENTS OF NONCOMPLIANCE--Continued

Where BLM served notice of noncompliance and assessment on an individual other than the lessee's designated representative for service yet the lessee gained knowledge of the notice and timely sought review, the lessee was not prejudiced by BLM's failure to serve a designated representative.

BLM may properly issue a notice of incidents of noncompliance requiring a unit operator to file a form designating a successor operator and assess liquidated damages under 43 CFR 3163.3(a) (1984), for failure to comply with that notice.

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

The procedural protection afforded by sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982 (43 U.S.C. § 1719 (1982)), does not apply to assessments levied under the oil and gas lease operating regulations.

In addition to any loss or damage to Federal resources and improvements which may result from a violation of the operating regulations, BLM incurs costs and expenses which would not have been incurred but for the noncompliance. If the issuance of an INC is technically and procedurally correct and the operator fails to abate the violation within the specified time, it is proper to impose an assessment to cover loss or damage to the lessor from the noncompliance, including administrative or other costs to the United States.

M. John Kennedy, 102 IBLA 396 (June 21, 1988)

An assessment made pursuant to 43 CFR 3163.3(a) (1986), may be levied where an operator has failed to comply with a written order or instruction of an authorized BLM officer.

Dalport Oil Corp., 104 IBLA 327 (Sept. 21, 1988)

OIL AND GAS LEASES--ContinuedINCIDENTS OF NONCOMPLIANCE--Continued

BLM may properly assess a designated operator \$250 pursuant to 43 CFR 3163.3(a) (1986), for failure to comply, within a designated abatement period, with a written order to abide by stipulations governing the abandonment of a lease well, regardless of whether the failure to comply might be attributable to a "de facto" operator of the well.

Celeste C. Grynberg (dba Grynberg Petroleum Co.), 106 IBLA 387 (Jan. 23, 1989)

Under 43 CFR 3162.5-1(c) and NTL 2-B, BLM may properly require the removal of all fluids discharged into a surface pit and may impose a civil assessment for failure to timely comply with an order to do so.

Conley P. Smith Oil Producer, 110 IBLA 92 (July 27, 1989)

KNOWN GEOLOGIC STRUCTURE

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)



# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. K. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Ruckstuhl, 85 IBLA 69 (Feb. 11, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

An application for a noncompetitive future interest oil and gas lease is properly rejected where the land applied for is known to contain mineral deposits or is within the known geologic structure of a producing oil or gas field.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

Where production is had under a state spacing order which would be attributable on a pro rata basis to Federal mineral interests within the spacing unit, such production prima facie establishes that the Federal land is within a known geologic structure of a producing oil and gas field, even where the United States has not consented to the communitization of the Federal interests pursuant to the state spacing order.

Lee Oil Properties, Inc., et al., 85 IBLA 287 (Mar. 13, 1985)

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by

OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geological structure of a producing oil or gas field, that portion within the known geological structure may only be leased by competitive bidding. Where lands are determined to be within a known geological structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8305141, 85 IBLA 307 (Mar. 19, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where appellant fails to show error, the determination will be upheld.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such rights must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Satellite 8301106, Satellite 8303104, 86 IBLA 172 (Apr. 26, 1985)

Floyd L. Huenergarte, 88 IBLA 48 (July 15, 1985)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

James D. Creighton, 87 IBLA 79 (May 28, 1985)

Michael R. Diefenderfer, 89 IBLA 366 (Nov. 20, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Where the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined addition to a known geologic structure, the lessee is required to pay increased rental of \$2 per acre for the entire lease.

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain



OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

Sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), provides that lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. If lands are determined to be within a known geologic structure prior to issuance of a lease, BLM has no authority to exercise discretion in the matter and must reject a noncompetitive oil and gas lease offer for such lands.

Lavada S. Jackson, 89 IBLA 167 (Oct. 10, 1985)

Pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous noncompetitive oil and gas lease application for such lands must be rejected.

Neva F. Riley, 89 IBLA 216 (Oct. 25, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer must be rejected where the lands are determined to be within a known geologic structure after the simultaneous oil and gas lease drawing, but before the lease is issued.

A noncompetitive oil and gas lease applicant who challenges the determination that land is within a known geologic structure bears the burden of proving by

OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

a preponderance of the evidence that the determination is erroneous.

Edward W. Eidt, 89 IBLA 270 (Nov. 8, 1985)

Land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding. Where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show the determination is in error by a preponderance of the evidence considered.

Thomas Bohr, Jr., William Collister, 89 IBLA 384 (Nov. 22, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

David R. Wilson, 90 IBLA 7 (Nov. 27, 1985)

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

Carolyn J. McCutchin, 93 IBLA 134 (July 29, 1986)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence received.

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre pursuant to 43 CFR 3103.2-2(d), if BLM determines during the lease term that any part of the land included in the lease is within a known geologic structure.

Leonard Luning, 90 IBLA 12 (Dec. 3, 1985)

Under 30 U.S.C. § 226(b) (1982), land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding. If land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field must show by a preponderance of the evidence that the determination is in error.

Charles J. Frank, 90 IBLA 33 (Dec. 10, 1985)

Sherbourne Partnership, 90 IBLA 130 (Dec. 24, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where the land in a noncompetitive lease offer is determined at any time prior to issuance of the lease to be within a known geologic structure of a producing oil or gas field, that land may only be leased by competitive bidding. A noncompetitive oil and gas lease offer for such land must be rejected. The drawing of a simultaneous oil and gas lease application merely establishes

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

the priority of filing an offer; it does not create any property or contract rights.

Satellite 8303147, 90 IBLA 103 (Dec. 23, 1985)

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Armey, 90 IBLA 375 (Feb. 27, 1986)

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Budde, 91 IBLA 162 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Ralph E. Peterson, 94 IBLA 340 (Nov. 26, 1986)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Semanko, 91 IBLA 348 (Apr. 22, 1986)

One who challenges a determination by the Bureau of Land Management that land is within the known geological structure of a producing oil or gas field has the burden of showing the determination is in error.

Gladys Walta, 91 IBLA 352 (Apr. 23, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 384 (Apr. 28, 1986)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that the land is within a section transected by the 20-foot isopach

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

of a productive formation and the lessee fails to present a preponderance of evidence to the contrary.

J. A. Masek dba Masek Oil Co., Barbara B. Sweeney, 92 IBLA 12 (May 6, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Joel Yancey Wilson, 93 IBLA 101 (July 22, 1986)

BLM must reject a noncompetitive oil and gas lease offer where the land has been determined to be within a known geologic structure of a producing oil or gas field after the simultaneous oil and gas lease drawing but prior to issuance of a lease.

Mark A. Stephens, 93 IBLA 287 (Sept. 3, 1986)



# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof, the land is determined to be within the known geologic structure of a producing oil or gas field.

Hrubetz Oil Co., 93 IBLA 343 (Sept. 11, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 135 (Oct. 21, 1986)

A decision of BLM delineating the boundaries of a known geologic structure of a producing oil and gas field will be affirmed where, based on the stratigraphic nature of the hydrocarbon accumulations, BLM

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

draws the exterior boundaries on the basis of the zero-net-effective reservoir isopach of a producing formation.

BLM Instruction Memoranda and Manual provisions do not generally have the force and effect of law.

Pamela S. Crocker-Davis, 94 IBLA 328 (Nov. 24, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Designation of land as situated within a known geologic structure of a producing oil or gas field will be sustained on appeal where there is a reasonable probability the land is underlain by at least one sandstone body in a particular formation which has been determined to be productive in that area, and appellant fails to establish by a preponderance of the evidence that the designation is in error.

Wally J. Picou, 95 IBLA 98 (Dec. 31, 1986)

BLM is required to reject a simultaneous noncompetitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the application occasioned by Departmental review of noncompetitive leasing in the Wyoming overthrust belt area.

A simultaneous oil and gas lease applicant will not be deemed to have overcome a determination by BLM that land described in the application is within a known geologic structure of a producing oil or gas field by a preponderance of the evidence if the appellant does not challenge BLM's placement of the estimated structural limits of the productive formation or if the evidence submitted merely demonstrates that there is a divergence of expert opinion regarding

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

whether that formation extends under the land at a producible depth.

When defining the exterior boundary of a known geologic structure of a producing oil or gas field BLM may not include the entire section any part of which is crossed by the stratigraphic contour used in the determination of the extent of the geologic structure.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

The Board will sustain a determination by BLM that land in a noncompetitive oil and gas lease is situated within the known geologic structure of a producing oil or gas field where the lessee has not established by a preponderance of the evidence that the land is down-dip of the gas/water contact in the productive formation or that the productive formation underlying the land is devoid of oil or gas in commercial quantities.

Celeste C. Grynberg, 96 IBLA 87 (Mar. 9, 1987)

Under 30 U.S.C. § 226(b) (1982), lands within the GKS of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected, notwithstanding the fact the offer was filed prior to such determination. A delay in adjudication of the offer to allow revision of procedures for determining GKS boundaries is reasonable where it is necessary to ensure lands properly deemed within a GKS are leased competitively as required by statute.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Jack J. Grynberg, 96 IBLA 316 (Apr. 2, 1987)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that land within the lease is included within the limits of productive formations as determined by the composite isopach of several productive formations and the lessee fails to present a preponderance of evidence to the contrary.

Lewis & Clark Exploration Co., 97 IBLA 171 (May 7, 1987)

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a GKS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

An applicant seeking a noncompetitive oil and gas lease for acquired lands who challenges a determination by BLM that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error. The Board of Land Appeals may properly consider data compiled both before and after a GKS determination in reviewing the merits of such determination.

Carolyn J. McCutchin, 99 IBLA 29 (Aug. 26, 1987)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that the land is not presumptively productive and where BLM, hence, justifiably relies on its geological opinion that the land is generally underlain by fractured reservoirs radiating from faults which at

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

certain points have been productive of oil and gas and the offeror at best presents a contrary opinion.

Beard Oil Co., et al., 99 IBLA 40 (Sept. 8, 1987)

Regulation 43 CFR 3103.2-2(a) requires the holder of a noncompetitive oil and gas lease to pay rental of \$3 per acre or fraction thereof for the sixth and each succeeding lease year.

Dorothy Radant, Robert Radant, 99 IBLA 84 (Sept. 9, 1987)

Where a party challenges BLM's designation of certain lands as being within a known geologic structure on the basis that BLM erred in calculating net pay values on a well log, that determination will not be disturbed on appeal when the party fails to show by a preponderance of evidence that BLM, in fact, erred.

Vera Kochergan, 99 IBLA 194 (Oct. 13, 1987)

BLM may properly designate lands as within a known geologic structure (KGS) of a producing oil or gas field even though such lands are not underlain by a dome or anticline. Lands underlain by stratigraphic traps of oil or gas may properly be designated as KGS lands, and such lands may be leased only by competitive bidding.

Carol Ann Hoffman, 100 IBLA 139 (Dec. 2, 1987)

Where, prior to the issuance of a noncompetitive oil and gas lease, BLM makes a determination that the lands covered by the noncompetitive offer are within a known geologic structure, that offer must be rejected.

Wilfred Plomis, 102 IBLA 337 (June 7, 1988)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure before the issuance of a lease, a noncompetitive lease offer for such lands must be rejected even though the offer was filed before the determination.

An applicant for a noncompetitive oil and gas lease who challenges a determination that lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is erroneous by a preponderance of the evidence.

Carolyn J. McCutchin, 103 IBLA 1 (June 21, 1988)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that BLM's determination is in error and where BLM justifiably relies on its technical experts for determination of the existence and extent of a known geologic structure.

Robert E. Eckels, Janet I. White, 104 IBLA 28 (Aug. 22, 1988)

A determination by BLM that lands are within a known geologic structure of a producing oil or gas field, which determination is based in part on aeromagnetic data, will not be disturbed in the absence of a showing of error by a preponderance of the evidence.

Wilfred Plomis et al., 104 IBLA 34 (Aug. 22, 1988)

Eileen Scully et al., 104 IBLA 42 (Aug. 22, 1988)



OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

A person challenging a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an addition to a known geologic structure, the lessee is required to pay an increased rental of \$2 per acre for the entire lease.

Jack J. Grynberg, 104 IBLA 51 (Aug. 24, 1988)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Lawrence A. Egan, 104 IBLA 57 (Aug. 25, 1988)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil and gas field. 43 CFR 3110.3(a).

A BLM decision rejecting a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, will be set aside and remanded, where the record on appeal

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

contains no supporting geological data to substantiate the basis for the determination.

Petex, Inc., 104 IBLA 72 (Aug. 26, 1988)

BLM must reject a noncompetitive oil and gas lease offer if prior to lease issuance the land is determined to be within a known geologic structure of a producing oil and gas field.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil and gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Gerald F. D'Unger, Stephen E. Bubala, 104 IBLA 104 (Aug. 31, 1988)

A noncompetitive oil and gas lease offeror who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence.

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field only to the extent of the smallest legal subdivision crossed by the exterior boundary of the producing structure, represented by a zero foot isopach.

Ecological Engineering Systems, Inc., 104 IBLA 117 (Sept. 1, 1988)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Under 30 U.S.C. § 226(b)(1) (1982), lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within a known geologic structure prior to issuance of a lease a noncompetitive lease offer for such lands must be rejected, notwithstanding that the offer was filed prior to such determination. BLM's delay in processing the lease offer can afford an offeror no rights because BLM is not obligated to issue a noncompetitive lease merely because it has received an offer for a particular parcel of land.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within a known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Lowell J. Simons, 104 IBLA 129 (Sept. 1, 1988)

BLM does not properly include land within the known geologic structure of a producing oil or gas field where the land does not constitute the smallest legal subdivision crossed by the productive limits of an entrapping structure but is included merely because it falls within a 640-acre state spacing unit.

Charles J. Rydzewski, 105 IBLA 9 (Oct. 7, 1988)

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field where BLM justifiably concludes that there is a reasonable probability that the land is underlain by a producing structure based on its interpretation of all relevant information that the land is underlain by channel sands which at certain points have been productive of oil and gas, and where the offeror merely presents a contrary opinion.

Roger Schock, 105 IBLA 121 (Oct. 24, 1988)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

A BLM determination that lands are within a known geologic structure of a producing oil and gas field will be sustained on appeal where the record shows that these lands are underlain by a formation determined to be productive elsewhere in the area, and where appellant fails to establish by a preponderance of the evidence that the designation is in error.

L. M. Grace, Jr., 105 IBLA 166 (Oct. 31, 1988)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where geologic evidence that the land is underlain by producing structures is not challenged by an appellant.

Judy P. Clifton, 105 IBLA 319 (Nov. 10, 1988)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

A BLM determination that land leased for oil and gas is within a known geologic structure will not be overturned where the evidence establishes that land within the lease is included within the limits of productive formations as determined by isopachs of several productive formations, well data, and other geologic information, and the lessee fails to present a preponderance of evidence to the contrary.

Celeste C. Grynberg, 105 IBLA 361 (Nov. 28, 1988)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

The Secretary of the Interior has no authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

A finding that land is within a known geological structure of a producing oil or gas field will ordinarily be upheld on appeal where the evidence of record, including well results, well logs, and structural maps, as analyzed by the Department's technical expert in reports in the file, supports a conclusion that the land is underlain by the trap of a productive formation and, hence, is presumptively productive. An appellant challenging such a finding has the burden of showing by a preponderance of the evidence that the finding is in error.

Jack J. Grynberg, 106 IBLA 9 (Nov. 30, 1988)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the finding is supported on the record by geologic evidence and the analysis of the Department's technical experts, the determination will not be altered in the absence of a showing of error by a preponderance of the evidence.

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre pursuant to 43 CFR 3103.2-2(d) where it determines during the lease term that any part of the land included in the lease is within a known geologic structure.

Winston L. Thornton et al., 106 IBLA 15 (Nov. 30, 1988)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

A person challenging a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an addition to a known geologic structure, the lessee is required to pay an increased rental of \$2 per acre for the entire lease.

Sinclair Oil Corp., 106 IBLA 33 (Dec. 7, 1988)

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that BLM's determination is in error and where BLM justifiably relies on its technical experts for determination of the existence and extent of a known geologic structure.

Bruno D'Agostino, 106 IBLA 155 (Dec. 19, 1988)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that lands are within a KGS has the burden of establishing by a preponderance of the evidence that inclusion of the land is erroneous.

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic as well as structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)



# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will not be set aside when it is not arbitrary and capricious and is supported by competent evidence.

Absent some justification to show the relation between state-established spacing units and the concept of a KGS, BLM should include in a KGS only the smallest legal boundary of the structural or stratigraphic trap. A KGS boundary which has been positioned to include all sections touched by the zero contour line of an isopach map must be retracted to include only the smallest legal subdivision traversed.

When in response to an appeal BLM makes statements of fact which are inconsistent with the findings concerning the extent of a presumably productive formation shown by the isopach map for the KGS, the Board will conclude that the map incorrectly portrays the formation.

Celeste C. Grynberg, Jack J. Grynberg, 106 IBLA 219 (Dec. 23, 1988)

Pursuant to 43 CFR 3103.2-2(d), BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental where, during the lease term, any part of the leased land is included within a known geologic structure.

A determination that lands are within a known geologic structure of a producing oil or gas field, based in part on aeromagnetic data, will not be disturbed absent a showing of error by a preponderance of the evidence.

Jack J. Grynberg, 106 IBLA 367 (Jan. 13, 1989)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

A BLM determination that lands are within a known geologic structure of a producing oil and gas field will be sustained on appeal where the record shows that these lands are underlain by a formation determined to be productive elsewhere in the area, and where appellant fails to establish by a preponderance of the evidence that the designation is in error.

BLM does not properly include land within the known geologic structure of a producing oil or gas field where the land does not constitute the smallest legal subdivision crossed by the productive limits of an entrapping structure but is included merely because it falls within a 640-acre state spacing unit.

Patricia A. Laudon, 107 IBLA 26 (Jan. 25, 1989)

Where appellant's lease contains provision for increase of rental rate upon reclassification of her leasehold, or any part thereof, within a known geologic structure, both lessor and lessee are bound by the terms of the lease.

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

Under 30 U.S.C. § 226(b) (1982), public domain lands within the KGS of a producing oil and gas field shall be leased to the highest responsible qualified bidder by competitive bidding. The Department has no discretion to issue noncompetitive leases for KGS lands. Therefore, if the lands described in a non-competitive lease offer for those lands must be rejected.

A KGS, as defined by 43 CFR 3100.0-5(1), is technically the trap in which an accumulation of oil

OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

and gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

A person challenging a Departmental determination that lands are within a KGS has the burden of showing by a preponderance of the evidence that the determination is in error. To establish the preponderance of the evidence means to prove that something is more likely so than not; in other words, "the preponderance of the evidence" means such evidence, when considered and compared with the opposite to it, has more convincing force and produces in your mind's belief that what is sought to be proved is more likely to be true than not.

The Secretary of the Interior has traditionally delegated the responsibility for determining the existence and extent of a KGS to his technical experts in the field. When a technical expert makes a determination that lands qualify for inclusion in a KGS, the Secretary is entitled to rely upon his reasoning. On the other hand, the determination of whether the lands are properly included in a KGS is largely dependent upon factual interpretation, and when there is a material issue of fact determinative of the issues posed, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. When the necessary showing is made, a BLM decision increasing the rental on the basis of the KGS determination will be reversed.

Osage Associates January 1983, 107 IBLA 233 (Feb. 21, 1989)

OIL AND GAS LEASES--ContinuedKNOWN GEOLOGIC STRUCTURE--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

The fact that the boundaries for this portion of the KGS were established based upon data from a limited number of wells does not mean that BLM erred in relying upon the information. Regardless of whether the available information is sparse or abundant, when a KGS determination is challenged, the relevant questions concern the reasonableness of the inferences which have been made based upon the data and the extent to which BLM's conclusions concerning the geologic structure are supported or contradicted by the available data.

The determination that land is within a KGS does not guarantee that the entire area is productive; it only shows that on the basis of geological evidence the Department has determined there is a structure in which oil or gas is trapped and there is production from a well on that structure. So long as there is production, BLM is not restricted as to which formation it may select as the basis for defining a KGS.

Land is included in the KGS on the basis of geologic evidence indicating that the structure underlies the land, not on the basis of evidence that oil and gas is contained in that portion of the structure which underlies the land. Consequently, the fact that land within the KGS is later found not to be productive does not mean that it was improperly included or that the criteria for its inclusion were deficient.

Joy Goldschmidt, Jack J. Grynberg, 107 IBLA 237 (Feb. 21, 1989)



# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

The fact that the boundary of a portion of a KGS is established based upon data from a limited number of wells does not mean that BLM errs in relying upon the information. When a KGS determination is challenged, the relevant questions concern the reasonableness of the inferences which have been made based upon well data and the extent to which BLM's conclusions concerning the geologic structure are supported or contradicted by the available information.

The determination that land is within a KGS does not guarantee that it will be productive; it means only that, on the basis of geological evidence, the Department has determined there is a structure in which oil or gas is trapped and there is production from a well on that structure. Land is included in the KGS when the geologic evidence indicates that the structure underlies the land, not on the basis of evidence that oil and gas is contained in the portion of the structure under the land.

Paul E. Pendergrass, 108 IBLA 125 (Mar. 31, 1989)

A regulation requiring an increased rental rate of \$2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

# OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

The Secretary of the Interior lacks authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

A determination that lands are within a known geologic structure of a producing oil or gas field will be sustained on appeal where the record shows lands are underlain by a formation determined to be productive elsewhere in the area, and where appellant fails to establish by a preponderance of the evidence that the designation is in error.

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. An appellant challenging a KGS determination must either show that the producing structure does not underlie the land or affirmatively establish that the structure in question is not productive in the land in question.

Petroport Corp., 109 IBLA 383 (June 26, 1989)



OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

The Board will sustain a BLM decision rejecting a noncompetitive oil and gas lease offer for land situated within the known geologic structure of a producing gas field where the offeror fails to establish by a preponderance of the evidence that the land is not properly considered presumptively productive of gas.

Ricky J. Calhoun, 110 IBLA 112 (Aug. 4, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc.,  
110 IBLA 130 (Aug. 9, 1989)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure before issuance of a lease, the noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

OIL AND GAS LEASES--Continued

## KNOWN GEOLOGIC STRUCTURE--Continued

Where a dry hole adjacent to leased land is surrounded by producing wells and noncommercial producers exhibiting positive drill-stem tests for oil, a lessee's contention that a known geologic structure does not underlie his lease or that the structure in question is not productive is not proved.

Steven Gerald Kirkwood, 110 IBLA 363 (Sept. 14, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that her leased lands are within the known geologic structure of a producing oil or gas field has the burden of proving that determination to be correct.

Where the Secretary's technical expert has made a reasoned analysis of available geologic data, the Secretary is entitled to rely on that opinion, absent a showing of error by a preponderance of the evidence.

Where it is determined that lands in a noncompetitive oil and gas lease are within an undefined addition to a known geologic structure, the lessee is required to pay an increased rental of \$2 per acre for the entire lease.

Celeste C. Grynberg, 112 IBLA 13 (Nov. 14, 1989)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d) (1987), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure of a producing oil or gas field.

An individual who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing, by a preponderance of the evidence, that the determination is in error.

Liberty Petroleum Corp., 112 IBLA 65 (Nov. 21, 1989)

## OIL AND GAS LEASES--Continued

### KNOWN GEOLOGIC STRUCTURE--Continued

Filing a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on terms available at the time the lease offer was made. The Secretary may suspend a portion of a lease offer pending additional KGS study.

Ervin R. Wepplo, 112 IBLA 69 (Nov. 22, 1989)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Terra Resources, Inc., 112 IBLA 94 (Nov. 28, 1989)

Delineation of a KGS recognizes the existence of a continuous entrapping structure, on some part of which there is production, or of numerous related, but nevertheless independent, stratigraphic or structural traps. A party challenging a determination that lands are within a KGS must either show that the producing structure does not underlie the land or affirmatively establish that the land involved is not productive from the structure in question. A determination by a Departmental technical expert that lands qualify for inclusion in a KGS will be upheld when it is not arbitrary and capricious and is supported by competent evidence.

When a KGS determination is challenged, the relevant questions concern the reasonableness of the inferences which have been made based upon well data

## OIL AND GAS LEASES--Continued

### KNOWN GEOLOGIC STRUCTURE--Continued

and the extent to which BLM's conclusions concerning the geologic structure are supported or contradicted by the available information.

Land is included in a KGS on the basis of geologic evidence indicating that the structure underlies the land, not on the basis of evidence that oil and gas is contained in that portion of the structure which underlies the land. Consequently, the fact that land within the KGS is later found not to be productive does not mean that it was improperly included or that the criteria for its inclusion were deficient.

Source Petroleum Co., 112 IBLA 184 (Dec. 13, 1989)

### LANDS SUBJECT TO

Where an offer to lease oil and gas on acquired lands describes land, part of which is within an incorporated city and part of which is outside the city, the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1982), precludes leasing of those lands within the city.

Sam P. Jones (On Judicial Remand), 84 IBLA 331 (Jan. 11, 1985)

While the general Departmental policy is not to suspend oil and gas lease offers to await possible future leasing of lands, the policy is not without exception. Where circumstances warrant suspension and suspension is not precluded by 43 CFR 2091.1, oil and gas lease offers for acquired lands in the Nueces River Project under the jurisdiction of the Bureau of Reclamation may be suspended until the Bureau of Reclamation has completed its oil and gas management plan for that area.

Dinero Oil Corp., 84 IBLA 394 (Jan. 28, 1985)

OIL AND GAS LEASES--Continued

## LANDS SUBJECT TO--Continued

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135  
(Apr. 22, 1985) 92 I.D. 153

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

TXO Production Corp., 87 IBLA 85 (May 29, 1985)

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

Noncompetitive oil and gas lease offers for acquired lands in Michigan were rejected because the mineral estates were reserved when the land was conveyed to the United States. Where the offeror subsequently fails, on appeal, to provide any evidence to show rights to the oil and gas deposits

OIL AND GAS LEASES--Continued

## LANDS SUBJECT TO--Continued

have since vested in the United States by operation of law, the lease offers were properly rejected.

PMG, 90 IBLA 60 (Dec. 10, 1985)

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)  
93 I.D. 66

Lands situated within the boundaries of incorporated cities, towns, or villages are specifically excluded from oil and gas leasing by the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982).

Daniel C. Wychgram, 92 IBLA 18 (May 6, 1986)

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard H. Clark, 92 IBLA 353 (June 30, 1986)

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands



OIL AND GAS LEASES--ContinuedLANDS SUBJECT TO--Continued

available for simultaneous oil and gas lease applications.

Inexco Oil Co., 93 IBLA 124 (July 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Zoe C. Schluter, 93 IBLA 314 (Sept. 11, 1986)

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James B. Dodson, 94 IBLA 69 (Sept. 29, 1986)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

A detailed reevaluation to determine if the lands are within a known geologic structure is a statutory prerequisite to leasing acquired military lands within the City of Corpus Christi, Texas, pursuant to the Act of Oct. 19, 1984, P.L. 98-529, 98 Stat. 2697. A non-competitive lease may not be issued for such lands

OIL AND GAS LEASES--ContinuedLANDS SUBJECT TO--Continued

where there is no indication in the record that such an evaluation has been performed.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set aside and the casefile remanded to BLM for a determination regarding the proper qualification of the first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System pursuant to the provisions of the Wilderness Act of 1964, P.L. 88-577,

OIL AND GAS LEASES--ContinuedLANDS SUBJECT TO--Continued

78 Stat. 890, 16 U.S.C. §§ 1131-1136 (1982), are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984, subject to valid existing rights then existing.

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. Where oil and gas leases were inadvertently issued for lands that had been designated by Congress as wilderness before issuance of the lease, the Bureau of Land Management properly cancels the lease as to those lands.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

Lands that are already included in a valid, outstanding oil and gas lease are not subject to being leased again, and BLM properly rejects any over-the-counter offer insofar as it covers lands included in the outstanding lease.

BLM must reject a noncompetitive over-the-counter oil and gas lease offer insofar as the land sought has been patented with no reservation of oil and gas to the United States.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

The Secretary of the Interior has authority to cancel an oil and gas lease issued for lands not subject to leasing at the time of lease issuance. However, where BLM cancels a lease on the basis that oil and gas leasing had been suspended for the lands described in the lease in a previous agreement between BLM and the Forest Service, and it is subsequently shown that the suspension agreement was an improper withdrawal of Federal lands because the agencies failed to follow statutory withdrawal procedures in 43 U.S.C. § 1714 (1982), and the lands described in the lease are otherwise subject to leasing, it is improper to cancel the lease on the grounds the lands were not subject to leasing.

Clayton W. Williams, Jr., Exxon Corp., 103 IBLA 192 (July 25, 1988) 95 I.D. 102

OIL AND GAS LEASES--ContinuedLANDS SUBJECT TO--Continued

There is no time limit within which a decision to reject a lease offer or to issue a lease must be made. An oil and gas lease offer filed for lands which are subsequently designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. As the filing of an oil and gas lease offer creates no entitlement to a lease, a BLM decision rejecting oil and gas lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

Where a Federal oil and gas lease has issued covering land which has been patented with no mineral reservation to the United States in the patent, the oil and gas lease is properly canceled as to such land.

Under the over-the-counter noncompetitive leasing system, no offer to lease public domain lands could include acquired lands. Where it was subsequently shown that acquired lands were leased pursuant to a lease offer for public domain lands, the lease is properly canceled as to the acquired lands.

Atlantic Richfield Co., 105 IBLA 61 (Oct. 17, 1988)

The filing of a declaration of taking in a condemnation proceeding pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a (1982), vests the United States with fee simple absolute or such other estate or interest as was specified in the declaration.

North Dakota Rural Rehabilitation Corp., 105 IBLA 151 (Oct. 27, 1988)

# OIL AND GAS LEASES--Continued

## LANDS SUBJECT TO--Continued

A decision to cancel an oil and gas lease on the basis of circumstances existing at the time of lease issuance will be reversed in the absence of a showing that the lease was issued without legal authority under relevant statute or regulation regardless of the existence of grounds which would have been sufficient to support an exercise of the Department's discretionary authority to reject a lease offer for the lands.

Joan Chorney, 108 IBLA 43 (Mar. 21, 1989)

A decision to cancel an oil and gas lease will be affirmed on appeal to the extent it is shown that the lease was issued through administrative error for lands within a wilderness study area which the Department was barred by statute from leasing for oil and gas. The statutory protection afforded a bona fide purchaser of a lease under 30 U.S.C. § 184(h)(2) (1982), does not bar cancellation of a lease erroneously issued for lands which the Department was prohibited from leasing by act of Congress.

Joan Chorney (On Reconsideration), 109 IBLA 96 (June 5, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES

Under 30 U.S.C. § 226(b) (1982), lands within the known geological structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 84 IBLA 368 (Jan. 24, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested rights to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

R. K. O'Connell, 85 IBLA 29 (Jan. 30, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that



OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error.

Evelyn D. Ruckstuhl, 85 IBLA 69 (Feb. 11, 1985)

Lands within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR 3120. A noncompetitive oil and gas lease offer filed before the lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected.

V. H. Jernigan, 85 IBLA 138 (Feb. 20, 1985)

Norma Richardson, 86 IBLA 168 (Apr. 25, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field.

Victor E. Van Duzer, 85 IBLA 235 (Mar. 4, 1985)

Under 30 U.S.C. § 226(b) (1982) land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding, and where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show by a preponderance of the evidence considered that the determination is in error.

Mary Nan Spear, 85 IBLA 303 (Mar. 15, 1985)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

Pursuant to 30 U.S.C. § 226(b) (1982), where a portion of a noncompetitive lease offer is determined to be within a known geological structure of a producing oil or gas field, that portion within the known geological structure may only be leased by competitive bidding. Where lands are determined to be within a known geological structure at any time prior to issuance of a lease, an oil and gas lease offer for such lands must be rejected. An applicant for an oil and gas lease has no vested rights to issuance of a lease. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8305141, 85 IBLA 307 (Mar. 19, 1985)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where appellant fails to show error, the determination will be upheld.

John P. Brogan, 85 IBLA 379 (Mar. 26, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but

# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

prior to issuance of a lease, a lease offer for such lands must be rejected. The offeror has no vested rights to issuance of a lease.

Where BLM rejects a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, in the absence of supporting geological data in the record on appeal, a challenge to the KGS determination requires the decision be set aside as unsupported in fact.

Carolyn J. McCutchin, 86 IBLA 13 (Mar. 29, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that the land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Champlin Petroleum Co., 86 IBLA 37 (Apr. 9, 1985)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim part of the land in that parcel was designated as within the known geologic structure of a producing oil or gas field, the application was properly rejected as to the land so designated.

Marc W. Richman, 86 IBLA 143 (Apr. 23, 1985)

# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Satellite 8301106, Satellite 8303104, 86 IBLA 172 (Apr. 26, 1985)

Floyd L. Huenergarte, 88 IBLA 48 (July 15, 1985)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected. The applicant has no vested right to issuance of a lease.

An applicant for a simultaneous oil and gas lease who challenges a determination by BLM that land is within the known geologic structure of a producing oil or gas field has the burden of showing the determination is in error.

Leonard Luning, 87 IBLA 123 (May 31, 1985)

One who challenges a determination by the Bureau of Land Management that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

## OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravell an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on noncompetitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

Land determined to be within the known geological structure of a producing oil and gas field may be leased only through competitive bidding and a noncompetitive offer for such land is properly rejected. One who believes the land should no longer be included in a known geological structure and wishes to obtain a noncompetitive lease for the land must first petition for rescission of the known geological determination.

Matthew C. Mays et al., 88 IBLA 39 (July 10, 1985)

Land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding pursuant to 43 CFR Subpart 3120. A noncompetitive oil and gas lease offer filed before lands were determined to be within a known geologic structure but not accepted by the United States on the date of determination is properly rejected to the extent of inclusion of such lands.

Paul Chachula, 88 IBLA 279 (Sept. 10, 1985)

## OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error. Where the applicant fails to show error, the determination will be upheld.

Mary Lee H. Picou, 88 IBLA 356 (Sept. 26, 1985)

Sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), provides that lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. If lands are determined to be within a known geologic structure prior to issuance of a lease, BLM has no authority to exercise discretion in the matter and must reject a noncompetitive oil and gas lease offer for such lands.

Lavada S. Jackson, 89 IBLA 167 (Oct. 10, 1985)

Pursuant to sec. 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous noncompetitive oil and gas lease application for such lands must be rejected.

Neva F. Riley, 89 IBLA 216 (Oct. 25, 1985)



# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer must be rejected where the lands are determined to be within a known geologic structure before the simultaneous oil and gas lease drawing, but after the lease is issued.

A noncompetitive oil and gas lease applicant who challenges the determination that land is within a known geologic structure bears the burden of proving by a preponderance of the evidence that the determination is erroneous.

Edward W. Eidt, 89 IBLA 270 (Nov. 8, 1985)

Land within the known geologic structure of a producing oil or gas field may only be leased by competitive bidding. Where land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Geological Survey that land is within the known geologic structure of a producing oil or gas field is required to show the determination is in error by a preponderance of the evidence considered.

Thomas Bohr, Jr., William Collister, 89 IBLA 384 (Nov. 22, 1985)

BLM may properly reject a noncompetitive oil and gas lease offer where an attorney-in-fact signed the offer and submitted the first year's rental and the power of attorney did not prohibit the attorney-in-fact from filing offers on behalf of other participants, as required by 43 CFR 3112.4-1(b) (1982).

Satellite 8211104 et al., 89 IBLA 388 (Nov. 22, 1985)

# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

David R. Wilson, 90 IBLA 7 (Nov. 27, 1985)

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

Carolyn J. McCutchin, 93 IBLA 134 (July 29, 1986)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence received.

Leonard Luning, 90 IBLA 12 (Dec. 3, 1985)

Under 30 U.S.C. § 226(b) (1982), land within a known geologic structure of a producing oil or gas field may only be leased by competitive bidding. If land is determined to be within such a structure while a noncompetitive lease offer is pending, the offer must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field must show by

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

a preponderance of the evidence that the determination is in error.

Charles J. Frank, 90 IBLA 33 (Dec. 10, 1985)

Sherbourne Partnership, 90 IBLA 130 (Dec. 24, 1985)

The Secretary of the Interior has the authority to cancel by administrative decision a noncompetitive oil and gas lease which was invalid at its inception because it issued to a party other than the first-qualified applicant in violation of statute and Departmental regulations.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

Pursuant to 30 U.S.C. § 226(b) (1982), where the land in a noncompetitive lease offer is determined at any time prior to issuance of the lease to be within a known geologic structure of a producing oil or gas field, that land may only be leased by competitive bidding. A noncompetitive oil and gas lease offer for such land must be rejected. The drawing of a simultaneous oil and gas lease application merely establishes the priority of filing an offer; it does not create any property or contract rights.

Satellite 8303147, 90 IBLA 103 (Dec. 23, 1985)

Pursuant to sec. 17(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a simultaneous oil and gas lease application for such lands must be rejected.

Charley D. Armev, 90 IBLA 375 (Feb. 27, 1986)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James M. Chudnow, 91 IBLA 143 (Mar. 24, 1986)

BLM must reject a noncompetitive oil and gas lease offer to the extent it includes land determined after the filing of simultaneous oil and gas lease applications to be within a known geologic structure which, under 30 U.S.C. § 226(b) (1982), is subject to leasing only by competitive bidding.

John Budde, 91 IBLA 162 (Mar. 25, 1986)

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

Ralph E. Peterson, 94 IBLA 340 (Nov. 26, 1986)

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

Robert Semanko, 91 IBLA 348 (Apr. 22, 1986)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

BLM must reject a noncompetitive oil and gas lease offer for acquired lands pursuant to 43 CFR 3112.5-2(b) where the land sought to be leased is determined to be within a known geologic structure after a simultaneous oil and gas lease drawing but prior to lease issuance. In such circumstances, the offeror is not entitled to a refund of the filing fee submitted with her lease application or interest on the first year's advance rental submitted with her lease offer.

Evelyn D. Ruckstuhl, 91 IBLA 384 (Apr. 28, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil or gas field. The drawing of an application for a noncompetitive oil and gas lease creates no vested rights in the applicant; it only establishes the priority to be accorded conflicting applications.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of evidence.

Vincent Wortman, 92 IBLA 67 (May 22, 1986)

BLM must reject a simultaneous oil and gas lease application drawn with priority where the land had been determined to be within a known geologic structure of a producing oil or gas field after the lease drawing but prior to issuance of a lease.

Joel Yancey Wilson, 93 IBLA 101 (July 22, 1986)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

A defect in a noncompetitive oil and gas lease offer may, in the case of over-the-counter offers to lease, be curable. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, no curative submissions will be received by the Board of Land Appeals to reinstate lease offers which have correctly been rejected by BLM because of the deficiencies.

Burk Properties, 93 IBLA 117 (July 28, 1986)

An oil and gas lease, issued in response to an over-the-counter offer to lease, may properly be canceled by BLM where the lands described in such lease had been included in a prior lease, since terminated, and BLM failed to post such lands to its list of lands available for simultaneous oil and gas lease applications.

Inexco Oil Co., 93 IBLA 124 (July 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer where the land has been determined to be within a known geologic structure of a producing oil or gas field after the simultaneous oil and gas lease drawing but prior to issuance of a lease.

Mark A. Stephens, 93 IBLA 287 (Sept. 3, 1986)

BLM must reject a noncompetitive oil and gas lease offer for acquired lands already included in an outstanding lease.

Zoe C. Schluter, 93 IBLA 314 (Sept. 11, 1986)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 43 CFR 3120. A noncompetitive oil and gas lease offer is properly rejected where, during the pendency thereof,



OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

the land is determined to be within the known geologic structure of a producing oil or gas field.

Hrubetz Oil Co., 93 IBLA 343 (Sept. 11, 1986)

Where an over-the-counter lease offer is defective as filed, the offer receives no priority until the defect is cured.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

Pursuant to 30 U.S.C. § 226(b) (1982), lands within the geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where the lands are determined to be within a known geologic structure prior to issuance of a lease, a noncompetitive oil and gas lease offer for such lands must be rejected.

Where BLM rejects a noncompetitive lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, and the record does not reveal that the lands are included in the known geologic structure, the decision will be set aside as unsupported in fact and the case file remanded to BLM.

Estate of Duncan Miller, 94 IBLA 135 (Oct. 21, 1986)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

A defect in an over-the-counter noncompetitive oil and gas lease offer may be cured prior to rejection. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, after BLM has rejected an offer because of deficiencies, no curative submissions will be accepted.

Thomas J. Carmody, Anna S. Carmody, 94 IBLA 209 (Nov. 4, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Wally J. Picou, 95 IBLA 98 (Dec. 31, 1986)

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

Oil and gas lease offers received over-the-counter during the period established by an opening order are considered to have been filed simultaneously, and priority among them is determined by drawing in accordance with 43 CFR 1821.2-3.

Roberts & Koch, 95 IBLA 239 (Jan. 16, 1987)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer to the extent that it covers acquired military lands formerly included in an oil and gas lease which was relinquished. Lands formerly embraced within oil and gas leases that have been relinquished, to the extent they are subject to noncompetitive leasing, must be leased pursuant to the simultaneous filing procedures at 43 CFR Subpart 3112.

Robert D. Bluntzer, 95 IBLA 247 (Jan. 23, 1987)

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

BLM is required to reject a simultaneous noncompetitive oil and gas lease application drawn with priority if the land is found to be within a known geologic structure of a producing oil or gas field, even if the determination is made after the drawing and during a lengthy delay in the processing of the application occasioned by Departmental review of noncompetitive leasing in the Wyoming overthrust belt area.

Kathleen M. Blake et al., 96 IBLA 61 (Feb. 27, 1987)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

The Board will sustain a determination by BLM that land in a noncompetitive oil and gas lease is situated within the known geologic structure of a producing oil or gas field where the lessee has not established by a preponderance of the evidence that the land is down dip of the gas/water contact in the productive formation or that the productive formation underlying the land is devoid of oil or gas in commercial quantities.

Celeste C. Grynberg, 96 IBLA 87 (Mar. 9, 1987)

Under 30 U.S.C. § 226(b) (1982), lands within the KGS of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure prior to issuance of a lease, a noncompetitive lease offer for such lands must be rejected, notwithstanding the fact the offer was filed prior to such determination. A delay in adjudication of the offer to allow revision of procedures for determining KGS boundaries is reasonable where it is necessary to ensure lands properly deemed within a KGS are leased competitively as required by statute.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Jack J. Grynberg, 96 IBLA 316 (Apr. 2, 1987)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

## OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

An over-the-counter offer to lease for oil and gas is properly rejected by BLM where the offer is intended to be the joint offer of two persons but only one person has signed the offer.

Robert L. Fuller, Sonia Fuller, 98 IBLA 93 (June 11, 1987)

Where a record is shown, by a preponderance of the evidence, to be insufficient to support a BLM decision extending a KGS, the determination is reversed.

Richard E. O'Connell, 98 IBLA 283 (July 20, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 311.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

While defective regular "over-the-counter" noncompetitive oil and gas lease offers may be cured prior to adjudication by BLM, defects may not be cured by submission of additional material after the proper rejection of the offer.

Isabelle C. Chang, 99 IBLA 282 (Oct. 22, 1987)

## OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

In those cases where the mineral interest in the land will vest in the United States at some future date, a future interest oil and gas lease offer may be filed by a party qualified to file such an offer. When a noncompetitive oil and gas lease offer filed subsequent to vesting is rejected because an oil and gas lease had been issued to an offeror who had filed an offer prior to the date the minerals had vested in the United States, it must be shown that the offeror who was prior in time was qualified to file a future interest oil and gas lease offer. If the record does not contain evidence the prior offeror was so qualified, the decision rejecting the second offer will be set aside and the casefile remanded to BLM for a determination regarding the proper qualification of the first offeror, and, if necessary, cancellation of the lease issued to the first offeror.

F. F. Schell et al., 100 IBLA 296 (Dec. 22, 1987)

Where an offeror for a noncompetitive oil and gas lease for acquired lands within an approved unit agreement fails to submit, within a specified time period established by BLM, evidence either that the offeror has entered into the agreement, or that the unit operator does not object to lease issuance without unit joinder in accordance with 43 CFR 3101.3-1, or to request an extension of time for compliance, and where there are intervening rights, BLM may properly reject the offer.

Mary Nan Spear, 101 IBLA 13 (Jan. 22, 1988)

Lands that are already included in a valid, outstanding oil and gas lease are not subject to being leased again, and BLM properly rejects any over-the-counter offer insofar as it covers lands included in the outstanding lease.

BLM must reject a noncompetitive over-the-counter oil and gas lease offer insofar as the land sought has been patented with no reservation of oil and gas to the United States.

The terms of a noncompetitive over-the-counter oil and gas lease offer for public domain lands (Form 3100-11) provide that the offeror offers to lease "all



# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

or any" of the lands described on the offer that are available for lease. Under 43 CFR 3111.1-1(e), BLM is expressly empowered to accept over-the-counter non-competitive offers either "in whole or in part." In operation, BLM construes an over-the-counter oil and gas lease offer to include all available land in the tract described in the offer. After unavailable lands are rejected from the offer, the balance is properly leased. When BLM's authorized officer signs the lease forms, the offer is accepted in part, and a binding lease is created for the lands that were available for leasing, so that the offeror becomes liable for rental on the lease lands.

Under 43 CFR 3110.2, a lease offer may be withdrawn only if it is received by the proper BLM office before the lease has been signed. A withdrawal received after the lease is signed is ineffective, as a binding lease is created as of the time the offer form is signed by BLM.

A parcel that is included in a lease which has terminated is subject to leasing only under the simultaneous noncompetitive system, as provided by 43 CFR 3112.1-1. Where this parcel is subsequently included in a lease issued by BLM pursuant to a noncompetitive over-the-counter lease offer form, this lease is issued in violation of controlling regulations, and BLM properly cancels the lease insofar as it covers the parcel.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

Where, prior to the issuance of a noncompetitive oil and gas lease, BLM makes a determination that the lands covered by the noncompetitive offer are within a known geologic structure, that offer must be rejected.

Wilfred Plomis, 102 IBLA 337 (June 7, 1988)

# OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

A simultaneous oil and gas lease application is properly rejected where the executed lease forms are not received by the proper BLM office within 30 days from receipt of the notice as required by 43 CFR 3112.6-1(a). Delivery of such documents after regular business hours on the date they were required to have been filed does not constitute compliance with the 30-day requirement in 43 CFR 3112.6-1(a) where the documents are deemed by 43 CFR 1821.2-2(d) to have been filed on the next business day.

Santa Fe Energy Co., 102 IBLA 393 (June 21, 1988)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within such a structure before the issuance of a lease, a noncompetitive lease offer for such lands must be rejected even though the offer was filed before the determination.

An applicant for a noncompetitive oil and gas lease who challenges a determination that lands are within the known geologic structure of a producing oil or gas field has the burden of showing that the determination is erroneous by a preponderance of the evidence.

Carolyn J. McCutchin, 103 IBLA 1 (June 21, 1988)

A party making an over-the-counter oil and gas lease offer for land not surveyed under the rectangular system of the public land survey is required to provide a description of the land for which the offer is made as stated in 43 CFR 3111.2-2(b). It is the responsibility of the Bureau of Land Management to satisfy itself that the land described in the offer is available for leasing and that the lease may properly be issued.

Beard Oil Co., 103 IBLA 251 (July 27, 1988)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

A person challenging a determination by the Bureau of Land Management that land is within a known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Jack J. Grynberg, 104 IBLA 51 (Aug. 24, 1988)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Lawrence A. Egan, 104 IBLA 57 (Aug. 25, 1988)

Under 30 U.S.C. § 226(b) (1982), lands within the known geologic structure of a producing oil or gas field may be leased only by competitive bidding. A noncompetitive oil and gas lease offer is properly rejected where during the pendency thereof the land is determined to be within the known geologic structure of a producing oil and gas field. 43 CFR 3110.3(a).

A BLM decision rejecting a noncompetitive oil and gas lease offer on the grounds the parcel sought to be leased lies within a known geologic structure, will be set aside and remanded, where the record on appeal contains no supporting geological data to substantiate the basis for the determination.

Petex, Inc., 104 IBLA 72 (Aug. 26, 1988)

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

BLM must reject a noncompetitive oil and gas lease offer if prior to lease issuance the land is determined to be within a known geologic structure of a producing oil and gas field.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil and gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Gerald F. D'Unger, Stephen E. Bubala, 104 IBLA 104 (Aug. 31, 1988)

Under 30 U.S.C. § 226(b)(1) (1982), lands within a known geologic structure of a producing oil or gas field may be leased only by competitive bidding. Where lands are determined to be within a known geologic structure prior to issuance of a lease a noncompetitive lease offer for such lands must be rejected, notwithstanding that the offer was filed prior to such determination. BLM's delay in processing the lease offer can afford an offeror no rights because BLM is not obligated to issue a noncompetitive lease merely because it has received an offer for a particular parcel of land.

An applicant for a noncompetitive oil and gas lease who challenges a determination that land is within a known geologic structure of a producing oil or gas field has the burden of showing that the determination is in error by a preponderance of the evidence.

Lowell J. Simons, 104 IBLA 129 (Sept. 1, 1988)

If an Automated Simultaneous Oil and Gas Lease Application, Part B, is signed by someone other than the applicant, the application must show the relationship of the signatory to the applicant. An application which fails to disclose the relationship between the applicant and the signatory must be rejected. The

## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES--Continued

fact that it had been accepted for selection and subsequently selected for priority does not alter this requirement.

Robert Klabzuba, 104 IBLA 255 (Sept. 12, 1988)

The signing of an over-the-counter oil and gas lease offer by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease and creates a binding contract.

Leon F. Scully, Jr., 104 IBLA 367 (Sept. 27, 1988)

The Bureau of Land Management properly rejected over-the-counter oil and gas lease offers for lands previously included in expired leases since, under 43 CFR 312.1-1 (1986), such lands were subject to the filing of noncompetitive lease offers only in accordance with simultaneous filing procedures.

Floyd J. Lauber, 105 IBLA 234 (Nov. 4, 1988)

When BLM decides to issue a noncompetitive oil and gas lease, it is required to issue the lease to the person first making application for the lease if that person is qualified to hold a lease. Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Sec. 1274.14 of the BLM Manual sets out binding Bureau policy on how to time and date stamp documents, including over-the-counter lease offers received through the U.S. Postal Service or commercial delivery service, and BLM decisions affording priority on the basis of this policy will be affirmed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through the U.S. Postal Service shall be time and date stamped as of the time and date of receipt, with the sole exception that any offer received in the first scheduled receipt of mail

## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES--Continued

during the business day is properly time and date stamped as of the posted beginning hour for the day. In the absence of proof that an offer was in fact received by BLM in the first scheduled receipt of mail, BLM's action to time and date stamp the offer as of the time it was received will not be disturbed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through a commercial delivery source shall be time and date stamped as of the time and date it is actually received.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

An oil and gas lease offer for an unsurveyed island, which simply described a portion of a navigable lake which may have contained the island sought, did not comply with 43 CFR 311.2-1(b), because the offer failed to describe the desired land by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract and tied to an official corner of the public land survey.

Frederic Alan Maxwell, 105 IBLA 341 (Nov. 14, 1988)

The Secretary of the Interior has no authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

A finding that land is within a known geologic structure of a producing oil or gas field will ordinarily be upheld on appeal where the evidence of record, including well results, well logs, and structural maps, as analyzed by the Department's technical expert in reports in the file, supports a conclusion that the land is underlain by the trap of a productive formation and, hence, is presumptively productive. An appellant challenging such a finding has the burden of



OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

showing by a preponderance of the evidence that the finding is in error.

Jack J. Grynberg, 106 IBLA 9 (Nov. 30, 1988)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the finding is supported on the record by geologic evidence and the analysis of the Department's technical experts, the determination will not be altered in the absence of a showing of error by a preponderance of the evidence.

Winston L. Thornton et al., 106 IBLA 15 (Nov. 30, 1988)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

Under 30 U.S.C. § 226(b) (1982), public domain lands within the KGS of a producing oil and gas field shall be leased to the highest responsible qualified bidder by competitive bidding. The Department has no discretion to issue noncompetitive leases for KGS lands. Therefore, if the lands described in a non-competitive lease offer for those lands must be rejected.

A KGS, as defined by 43 CFR 3100.0-5(1), is technically the trap in which an accumulation of oil

OIL AND GAS LEASES--Continued

## NONCOMPETITIVE LEASES--Continued

and gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

Harry Ptasynski, 107 IBLA 197 (Feb. 15, 1989)

The Secretary of the Interior has no authority under the Mineral Leasing Act to issue a noncompetitive oil and gas lease for lands found to be within a known geologic structure of a producing oil or gas field subsequent to filing of the lease offer and prior to lease issuance. A noncompetitive lease offer for such lands must be rejected notwithstanding the lands were not known to be in a known geologic structure at the time the offer was filed.

Edward F. Scholls, 109 IBLA 23 (May 25, 1989)

Delay by the Bureau of Land Management in handling a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on the terms which were available at the time the lease offer was made. When the land in a noncompetitive lease offer is included within a known geologic structure, the Secretary loses authority to lease except by competitive bid, and the noncompetitive offer must be rejected.

Eugen Dumitru Georgescu, 109 IBLA 317 (June 21, 1989)

An oil and gas lease offer for acquired land located in the State of Michigan, which was filed on Oct. 18, 1985, is properly rejected due to premature filing where, in a warranty deed dated Oct. 18, 1935, passing title to the surface estate to the United States, the minerals were reserved in the grantor "until Fifty (50) years from date of this instrument," since the minerals did not vest in the United States until Oct. 19, 1985, according to the general rule applicable in Michigan, that when computing the time within which an action is to take place, the first day is excluded and the last day included.

Wilfred Plomis, 110 IBLA 11 (July 5, 1989)

## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES--Continued

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure before issuance of a lease, the noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

Land which is not within a special tar sand area is subject to noncompetitive oil and gas leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), only if the land had been offered for competitive bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was received or the highest bid received was less than the national minimum acceptable bid.

A parcel which was listed for competitive sale but was later withdrawn by BLM is not subject to noncompetitive leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), until the land has been made available for oral bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was submitted or the highest bid received was less than the national minimum acceptable bid.

Robert G. Volkmann, 112 IBLA 5 (Nov. 8, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that her leased lands are within the known geologic structure of a producing oil or gas field has the burden of proving that determination to be correct.

Where the Secretary's technical expert has made a reasoned analysis of available geologic data, the

## OIL AND GAS LEASES--Continued

### NONCOMPETITIVE LEASES--Continued

Secretary is entitled to rely on that opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 112 IBLA 13 (Nov. 14, 1989)

Filing a noncompetitive oil and gas lease offer creates no right in the offeror to lease issuance on terms available at the time the lease offer was made. The Secretary may suspend a portion of a lease offer pending additional KGS study.

Ervin R. Wepplo, 112 IBLA 69 (Nov. 22, 1989)

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

Terra Resources, Inc., 112 IBLA 94 (Nov. 28, 1989)

### OFFERS TO LEASE

In the absence of a proper receptacle for the receipt outside of established business hours of personally delivered filings, it was not improper for a BLM employee, prior to the opening of the BLM office, to receive acquired lands oil and gas lease offers in the hallway of the BLM office on the condition that they would be time and date stamped as of the opening of the office. An individual who voluntarily declined to submit his offer at that time cannot be heard later to claim unfair treatment and protest loss of priority

OIL AND GAS LEASES--Continued

## OFFERS TO LEASE--Continued

because the offer presented by him was machine time stamped 1 minute after the opening of the office.

Harris-Headrick, 85 IBLA 48 (Feb. 6, 1985)

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

Douglas H. Willson, W. G. Boonenberg, 86 IBLA 135 (Apr. 22, 1985) 92 I.D. 153

BLM may not award priority as of the date of filing an amended over-the-counter noncompetitive oil and gas lease offer for acquired lands where the original lease offer was defective only to the extent of having included some land within an incorporated city, town, or village, which was unavailable for leasing under 30 U.S.C. § 352 (1982) and which was excluded from the amended offer.

Kenneth W. Mitchell, 88 IBLA 163 (Aug. 16, 1985)

The drawing of an oil and gas lease applicant's name as a first-priority applicant in a simultaneous oil and gas lease drawing does not create any property or contract right, but merely establishes the priority for filing a lease offer. The offer is not accepted until the lease form is signed by the Bureau of Land Management.

A noncompetitive lease offer must be rejected by the Bureau of Land Management whenever it is determined

OIL AND GAS LEASES--Continued

## OFFERS TO LEASE--Continued

the land for which the offer is made is within a known geological structure.

Gladys Walta, 91 IBLA 352 (Apr. 23, 1986)

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

Raymond G. Albrecht, Fred L. Engle d/b/a Resource Service Co., 92 IBLA 235 (June 25, 1986) 93 I.D. 258

Lands within a national park or withdrawn from oil and gas leasing by Public Land Order are not available for oil and gas leasing and BLM properly rejects a noncompetitive oil and gas lease offer for such lands.

Richard H. Clark, 92 IBLA 353 (June 30, 1986)

A noncompetitive offer to lease for oil and gas filed in 1955 at a time when the Department's policy allowed issuance of a noncompetitive lease for lands within a known geologic structure is properly rejected in 1985 in accordance with 43 CFR 3110.3(a). No vested right to lease issuance is gained by the filing of an offer to lease.

Allen L. Lobrano, 94 IBLA 34 (Sept. 25, 1986)

BLM may properly reject a noncompetitive oil and gas lease offer signed by someone other than the offeror when it is not rendered in a manner to reveal the name of the signatory and the relationship between the offeror and signatory, in accordance with 43 CFR 3102.4. However, the BLM decision will be reversed



# OIL AND GAS LEASES--Continued

## OFFERS TO LEASE--Continued

where the evidence establishes that the offeror actually signed the offer forms.

Ethel K. Brauns, 94 IBLA 64 (Sept. 29, 1986)

BLM must reject a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field, even where the determination has been made long after submission of the offer. The offeror has no vested right to a lease by virtue of submission of the offer or the lengthy delay in its processing.

Wally J. Picou, 95 IBLA 98 (Dec. 31, 1986)

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

The attorney-in-fact regulation, 43 CFR 3112.6-1(b)(1), prohibits an attorney-in-fact from executing a lease offer under the simultaneous leasing procedures, 43 CFR Subpart 3112, for one party when he is authorized to file offers as an attorney-in-fact for another. It specifically requires that a power-of-attorney document expressly prohibit the attorney-in-fact from filing offers on behalf of any other participant. If a person whose power of attorney contains the prohibition signs a lease offer on behalf of another party, he violates the terms of his power of attorney.

Texaco Inc., 95 IBLA 397 (Feb. 24, 1987)

# OIL AND GAS LEASES--Continued

## OFFERS TO LEASE--Continued

Lands which are not within a known geological structure of a producing oil or gas field, or a favorable petroleum geological province in Alaska, which have been previously leased are subject to leasing only under the regulations at 43 CFR Subpart 3112. Those regulations provide that lands which have been offered and for which no applications have been received during the filing period are available for leasing by an over-the-counter lease offer.

Michigan Oil Co., 96 IBLA 1 (Feb. 25, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

An over-the-counter offer to lease for oil and gas is properly rejected by BLM where the offer is intended to be the joint offer of two persons but only one person has signed the offer.

Robert L. Fuller, Sonia Fuller, 98 IBLA 93 (June 11, 1987)

The drawing of an oil and gas lease applicant's name under the simultaneous leasing system does not create any property or contract right in the party whose name is drawn, but merely establishes the priority for purposes of filing a noncompetitive lease offer. It creates only a right to have the application fairly considered under the applicable statutory criteria. Timely return of executed lease

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

forms and payment of the first year's rental constitutes an offer to lease. An offer to lease is not accepted until the lease forms are signed by the authorized BLM officer.

The fact that land has been posted for filing of applications under the simultaneous leasing system does not bind the Secretary to lease the land noncompetitively, nor is the Secretary bound to lease the land when a qualified applicant has been selected. A noncompetitive lease offer must be rejected whenever it is determined that the land for which the offer is made is within a known geologic structure.

There is no time limit within which a decision to reject a lease offer or issue a lease must be made.

Shaw Resources, Inc., et al., 98 IBLA 96 (June 12, 1987)

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 311.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that the land is not presumptively productive and where BLM, hence, justifiably relies on its geological opinion that the land is generally underlain by fractured reservoirs radiating from faults which at

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

certain points have been productive of oil and gas and the offeror at best presents a contrary opinion.

Beard Oil Co., et al., 99 IBLA 40 (Sept. 8, 1987)

Where an offeror for a noncompetitive oil and gas lease for acquired lands within an approved unit agreement fails to submit, within a specified time period established by BLM, evidence either that the offeror has entered into the agreement, or that the unit operator does not object to lease issuance without unit joinder in accordance with 43 CFR 3101.3-1, or to request an extension of time for compliance, and where there are intervening rights, BLM may properly reject the offer.

Mary Nan Spear, 101 IBLA 13 (Jan. 22, 1988)

An offer to lease a tract of land for oil and gas constitutes an offer to lease any and all of the lands described therein which are available for leasing. Where a lease offer describes a tract of acquired land outside the area of the public land surveys, part of which is unavailable for leasing, a decision of BLM requiring an oil and gas lease offeror to provide a metes and bounds description of those lands available for leasing will be affirmed. The filing of such a description does not alter the priority of the lease offer.

Bruce Anderson, 101 IBLA 366 (Mar. 29, 1988)

BLM may reject a simultaneous oil and gas lease offer pursuant to 43 CFR 3112.5-1(c) where the applicant fails to return three executed copies of the lease offer and stipulations within the time provided in the BLM notice. Here, it was error to reject a purportedly untimely submission of lease offer forms and stipulations because BLM effectively extended the time for such submission.

Vicki D. Graham, 102 IBLA 38 (Apr. 11, 1988)

## OIL AND GAS LEASES--Continued

### OFFERS TO LEASE--Continued

Lands that are already included in a valid, outstanding oil and gas lease are not subject to being leased again, and BLM properly rejects any over-the-counter offer insofar as it covers lands included in the outstanding lease.

BLM must reject a noncompetitive over-the-counter oil and gas lease offer insofar as the land sought has been patented with no reservation of oil and gas to the United States.

The terms of a noncompetitive over-the-counter oil and gas lease offer for public domain lands (Form 3100-11) provide that the offeror offers to lease "all or any" of the lands described on the offer that are available for lease. Under 43 CFR 3111.1-1(e), BLM is expressly empowered to accept over-the-counter, noncompetitive offers either "in whole or in part." In operation, BLM construes an over-the-counter oil and gas lease offer to include all available land in the tract described in the offer. After unavailable lands are rejected from the offer, the balance is properly leased. When BLM's authorized officer signs the lease forms, the offer is accepted in part, and a binding lease is created for the lands that were available for leasing, so that the offeror becomes liable for rental on the lease lands.

Under 43 CFR 3110.2, a lease offer may be withdrawn only if it is received by the proper BLM office before the lease has been signed. A withdrawal received after the lease is signed is ineffective, as a binding lease is created as of the time the offer form is signed by BLM.

A parcel that is included in a lease which has terminated is subject to leasing only under the simultaneous noncompetitive system, as provided by 43 CFR 3112.1-1. Where this parcel is subsequently included in a lease issued by BLM pursuant to a noncompetitive over-the-counter lease offer form, this lease is issued in violation of controlling regulations, and BLM properly cancels the lease insofar as it covers the parcel.

The effect of 43 CFR 4.21(a) is only to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal. It does not have the effect of suspending BLM's authority to act on matters that are functionally independent from the subject of the appeal. The

## OIL AND GAS LEASES--Continued

### OFFERS TO LEASE--Continued

unavailability of some lands in a noncompetitive over-the-counter lease offer has no effect on the validity of the offer for the remainder of the lands in the offer. Thus, the question of the correctness of BLM's rejection of part of an offer is independent from the question of the status of the offer for the remainder of the lands that it covers, so that BLM is free to accept the offer for the remainder notwithstanding that the time for appealing the partial rejection has not expired.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

Where, prior to the issuance of a noncompetitive oil and gas lease, BLM makes a determination that the lands covered by the noncompetitive offer are within a known geologic structure, that offer must be rejected.

Wilfred Plomis, 102 IBLA 337 (June 7, 1988)

Under the regulations in effect at the time of the decision, BLM was prohibited by 43 CFR 3120.7 from accepting a second highest bid which was less than 80 percent of the rejected high bid.

Tex-Spec Ventures, 103 IBLA 160 (July 21, 1988)

A party making an over-the-counter oil and gas lease offer for land not surveyed under the rectangular system of the public land survey is required to provide a description of the land for which the offer is made as stated in 43 CFR 3111.2-2(b). It is the responsibility of the Bureau of Land Management to satisfy itself that the land described in the offer is available for leasing and that the lease may properly be issued.

Beard Oil Co., 103 IBLA 251 (July 27, 1988)



OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

There is no time limit within which a decision to reject a lease offer or to issue a lease must be made. An oil and gas lease offer filed for lands which are subsequently designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. As the filing of an oil and gas lease offer creates no entitlement to a lease, a BLM decision rejecting oil and gas lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

A noncompetitive oil and gas lease offer signed by the offeror may not be rejected by BLM pursuant to 43 CFR 3102.4, where the offeror's name on the accompanying stipulations is signed by the offeror's agent.

Florence Bern, 103 IBLA 260 (July 27, 1988)

BLM properly rejects noncompetitive oil and gas lease offers for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that BLM's determination is in error and where BLM justifiably relies on its technical experts for determination of the existence and extent of a known geologic structure.

Robert E. Eckels, Janet I. White, 104 IBLA 28 (Aug. 22, 1988)

A noncompetitive oil and gas lease offeror who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. The determination will not be disturbed in the absence of a showing of error by a preponderance of the evidence.

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

geologic structure of a producing oil or gas field only to the extent of the smallest legal subdivision crossed by the exterior boundary of the producing structure, represented by a zero foot isopach.

Ecological Engineering Systems, Inc., 104 IBLA 117 (Sept. 1, 1988)

If an Automated Simultaneous Oil and Gas Lease Application, Part B, is signed by someone other than the applicant, the application must show the relationship of the signatory to the applicant. An application which fails to disclose the relationship between the applicant and the signatory must be rejected. The fact that it had been accepted for selection and subsequently selected for priority does not alter this requirement.

Robert Klabzuba, 104 IBLA 255 (Sept. 12, 1988)

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field where BLM justifiably concludes that there is a reasonable probability that the land is underlain by a producing structure based on its interpretation of all relevant information that the land is underlain by channel sands, which at certain points have been productive of oil and gas, and where the offeror merely presents a contrary opinion.

Roger Schock, 105 IBLA 121 (Oct. 24, 1988)

The filing of a declaration of taking in a condemnation proceeding pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a (1982), vests the United States with fee simple absolute or such other estate or interest as was specified in the declaration.

North Dakota Rural Rehabilitation Corp., 105 IBLA 151 (Oct. 27, 1988)

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

The Bureau of Land Management properly rejected over-the-counter oil and gas lease offers for lands previously included in expired leases since, under 43 CFR 3112.1-1 (1986), such lands were subject to the filing of noncompetitive lease offers only in accordance with simultaneous filing procedures.

Floyd J. Lauber, 105 IBLA 234 (Nov. 4, 1988)

When BLM decides to issue a noncompetitive oil and gas lease, it is required to issue the lease to the person first making application for the lease if that person is qualified to hold a lease. Priority of an offer received over-the-counter shall be determined as of the time and date the offer is filed in the proper BLM office. Sec. 1274.14 of the BLM Manual sets out binding Bureau policy on how to time and date stamp documents, including over-the-counter lease offers received through the U.S. Postal Service or commercial delivery service, and BLM decisions affording priority on the basis of this policy will be affirmed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through the U.S. Postal Service shall be time and date stamped as of the time and date of receipt, with the sole exception that any offer received in the first scheduled receipt of mail during the business day is properly time and date stamped as of the posted beginning hour for the day. In the absence of proof that an offer was in fact received by BLM in the first scheduled receipt of mail, BLM's action to time and date stamp the offer as of the time it was received will not be disturbed.

Under the BLM Manual, any over-the-counter oil and gas lease offer received through a commercial delivery source shall be time and date stamped as of the time and date it is actually received.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

An oil and gas lease offer for an unsurveyed island, which simply described a portion of a navigable lake which may have contained the island sought, did not comply with 43 CFR 3111.2-1(b), because the offer failed to describe the desired land by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract and tied to an official corner of the public land survey.

Frederic Alan Maxwell, 105 IBLA 341 (Nov. 14, 1988)

BLM properly rejects a noncompetitive oil and gas lease offer for land determined to be within the known geologic structure of a producing oil or gas field where the offeror fails to establish by a preponderance of the evidence that BLM's determination is in error and where BLM justifiably relies on its technical experts for determination of the existence and extent of a known geologic structure.

Bruno D'Agostino, 106 IBLA 155 (Dec. 19, 1988)

BLM properly rejects a telecopy of a lease offer because it does not bear a personal handwritten signature as required by 43 CFR 3112.6-1(a) and 3102.4.

Reed Gilmore (On Reconsideration), 107 IBLA 37 (Jan. 26, 1989)

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)  
96 I.D. 77

OIL AND GAS LEASES--ContinuedOFFERS TO LEASE--Continued

The Board will sustain a BLM decision rejecting a noncompetitive oil and gas lease offer for land situated within the known geologic structure of a producing gas field where the offeror fails to establish by a preponderance of the evidence that the land is not properly considered presumptively productive of gas.

Ricky J. Calhoun, 110 IBLA 112 (Aug. 4, 1989)

Land which is not within a special tar sand area is subject to noncompetitive oil and gas leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), only if the land had been offered for competitive bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was received or the highest bid received was less than the national minimum acceptable bid.

A parcel which was listed for competitive sale but was later withdrawn by BLM is not subject to noncompetitive leasing under 30 U.S.C. § 226(c)(1) (Supp. V 1987), until the land has been made available for oral bidding under 30 U.S.C. § 226(b)(1)(A) (Supp. V 1987), and no bid was submitted or the highest bid received was less than the national minimum acceptable bid.

Robert G. Volkmann, 112 IBLA 5 (Nov. 8, 1989)

PATENTED OR ENTERED LANDS

The Bureau of Land Management properly rejects an oil and gas lease offer for lands for which the minerals have been patented pursuant to the placer mining law.

James B. Dodson, 94 IBLA 69 (Sept. 29, 1986)

BLM must reject a noncompetitive over-the-counter oil and gas lease offer insofar as the land sought has been patented with no reservation of oil and gas to the United States.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

OIL AND GAS LEASES--ContinuedPRODUCTION

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982) regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. Such a well must be in physical condition to



OIL AND GAS LEASES--ContinuedPRODUCTION--Continued

produce and is not in such condition if the casing has not been perforated.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration),  
100 IBLA 371 (Jan. 15, 1988) <sup>95 I.D. 1</sup>

Where the evidence establishes that a well drilled under an allotted Indian lands lease is no longer capable of producing oil or gas in paying quantities, and an opportunity has been afforded to the Indian lessor to obtain another operator but attempts to obtain one have been unsuccessful, a decision by BLM permitting the original operator to plug and abandon the well will be affirmed.

Everett Hall, 101 IBLA 362 (Mar. 28, 1988)

REINSTATEMENT

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

A petition for reinstatement of a terminated oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), must be filed on or before the earlier of (1) 60 days after the lessee received notice of termination, or (2) 15 months after termination of the lease. Where the lessee receives a notice of termination and fails to file a petition within 60 days, reinstatement is properly denied.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Leases reinstated pursuant to 30 U.S.C. § 188(d) (1982) shall be subject to the conditions contained in 30 U.S.C. § 188(e) (1982).

Charles F. Egger, John E. Jones, Jimmy R. Lynn II,  
85 IBLA 385 (Mar. 27, 1985)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the lessee was merely financially unable to pay the rental when due.

In order to qualify for class II reinstatement, the lessee must establish that the failure to timely pay was inadvertent. An inadvertent act involves carelessness, oversight, mistake, or the failure to pay careful and prudent attention to a situation. A lessee's failure to timely pay rental is not inadvertent where the lessee was merely financially unable to pay the rental when due.

Dena F. Collins, 86 IBLA 32 (Apr. 3, 1985)

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

Where rental payment for an oil and gas lease with a June 1 anniversary date is postmarked May 31 and received in the proper office on June 5, under 43 CFR 3108.2-1(a) such action may constitute reasonable diligence for purposes of class I reinstatement; however, where the payment is less than the full amount and the lessee fails to pay the full amount within 20 days after the anniversary date, class I reinstatement is precluded.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of the record of the lease, and not the potential assignee, may petition to have the lease reinstated on the grounds that reasonable diligence was exercised or that the late payment was justified.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345 (May 16, 1985)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. § 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of \$5 per

# OIL AND GAS LEASES--Continued

## REINSTATEMENT--Continued

acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Hugh Carter Crutchfield Trust, 87 IBLA 27 (May 22, 1985)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Under 30 U.S.C. § 188(d), (e) (1982), a noncompetitive oil and gas lease terminated automatically for untimely payment of annual rental may be reinstated if the petitioner shows that failure to pay timely was inadvertent and submits within 60 days from receipt of notice of termination a petition for reinstatement together with the required back rental accruing from the date of termination. Petitioner must also agree to increased rental and royalty rates and submit a reinstatement fee and Federal Register publication costs.

Donald D. Dunn, 87 IBLA 316 (June 25, 1985)

# OIL AND GAS LEASES--Continued

## REINSTATEMENT--Continued

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 43 U.S.C. § 188(c) (1982).

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

Wayne J. Stastny, 90 IBLA 357 (Feb. 27, 1986)

Under 30 U.S.C. § 188(c) (1982) which provides for Class I reinstatement, the Department has no authority to reinstate a lease which has terminated for nonpayment of rental unless the rental payment has been paid or tendered within 20 days of the anniversary date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition



OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

Richard G. Fowler, 89 IBLA 175 (Oct. 11, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

PRM Exploration Co., 90 IBLA 63 (Dec. 10, 1985)  
92 I.D. 617

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable because he was moving from Texas to California a month before the payment was due and there was a delay in receipt of the rental billing notice.

Melvin P. Clarke, 90 IBLA 95 (Dec. 23, 1985)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Luceal Robert, 90 IBLA 182 (Jan. 23, 1986)

Where the record titleholder of an oil and gas lease has made numerous assignments of interests in that lease, none of which has been approved by BLM, and the lease terminates by operation of law for failure to pay rental timely, only the record titleholder, and not any of the holders of unapproved assignments, may successfully petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) or (d) (1982). The right to petition for reinstatement is personal to the record titleholder of the lease.

Howard H. Vinson et al., 90 IBLA 280 (Feb. 10, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of \$5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 349 (Feb. 26, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date.

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An assignment of operating rights in an oil and gas lease may not be approved after the lease has terminated for nonpayment of the annual rental and a decision dismissing a petition for reinstatement of the lease by the assignee of an unapproved assignment of operating rights will be affirmed.

Albert D. Fleck, Carl J. Williams, William L. Medallie, 91 IBLA 187 (Mar. 31, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert J. Stinnett, Lois C. Stinnett, 91 IBLA 239 (Apr. 8, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of \$5 per acre as well as reimbursement of administrative costs (up to \$500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

Where the record titleholder of an oil and gas lease fails to request reinstatement within 60 days of constructive service of a notice of termination of the lease, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM properly refuses to approve any pending assignments, as there is no lease interest left to be assigned.

BLM is obligated to notify only the lessee of record about the termination of an oil and gas lease. If the lessee has created an interest in any other person by agreement, the prospective assignee must



OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

look to the lessee to provide notice of the termination.

James Darby, 92 IBLA 231 (June 25, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ann L. Rose, 92 IBLA 308 (June 26, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edward R. Finch, 92 IBLA 330 (June 30, 1986)

Congress has enacted two provisions for reinstating a noncompetitive oil and gas lease which has automatically terminated by operation of law pursuant to 30 U.S.C. § 188(b) (1982) for failure to pay the rental timely. In order to qualify for class I reinstatement under 30 U.S.C. § 188(c) (1982), the rental must be tendered within 20 days of the anniversary date and the lessee must establish that failure to pay on time was either justifiable or not due to a lack of reasonable diligence. If failure to make timely payment was inadvertent, the lease may be eligible only for a class II reinstatement pursuant to 30 U.S.C. § 188(d) (1982). A lessee who was unaware that his lease would terminate if he did not mail his payment before the anniversary date has neither acted with

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

reasonable diligence nor established that his failure to make timely payment was justifiable.

Dominic D. Demicco, 92 IBLA 378 (July 8, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the rental payment was returned by the U.S. Postal Service as undeliverable because the address on the envelope was unreadable. Appellant must bear the consequences of the Postal Service's inability to timely deliver the rental payment.

Mailing the rental payment after the anniversary date does not constitute reasonable diligence.

Neal Hunter, 93 IBLA 80 (July 16, 1986)

A lease automatically terminated by operation of law pursuant to 30 U.S.C. § 188(b) (1982) may be reinstated pursuant to 30 U.S.C. § 188(c) if the lease rental has been paid within 20 days of the lease's anniversary date and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Inability to pay is not, in itself, a justifiable reason for failing to make timely payment.

Paul J. & Lyda R. Stivers, 93 IBLA 97 (July 22, 1986)



OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

A petition for reinstatement of noncompetitive oil and gas leases filed pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payments were mailed, to BLM after the lease anniversary dates and the illness asserted as justification for late payments is not substantiated as being the proximate cause of the late payments.

Larremore Petroleum Partnership, 94 IBLA 30 (Sept. 25, 1986)

Where a Federal oil and gas lessee fails to submit payment of annual rental within 20 days following the anniversary date of her lease, the Department lacks authority pursuant to 30 U.S.C. § 188(c) (1982), to reinstate her oil and gas lease which was terminated by operation of law for her failure to timely pay rental on or before the anniversary date of the lease.

Anna Beitman, 94 IBLA 148 (Oct. 21, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

Where a proposed assignment of an oil and gas lease has not been approved by BLM and the lease has automatically terminated by operation of law for failure to pay rental timely, only the original lessee as holder of record of the lease, and not the potential assignee, may petition to have the lease reinstated pursuant to 30 U.S.C. § 188(c), (d), and (e) (1982).

Stanley I. Okun, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert & Eileen Taylor, 94 IBLA 259 (Nov. 14, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 344 (Nov. 26, 1986)

The Secretary of the Interior may reinstate a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982) if the full rental is paid within 20 days of the lease anniversary date, and the failure to pay timely was justifiable or not due to a lack of reasonable diligence. Under 43 CFR 3108.2-1(a), a remittance postmarked by the U.S. Postal Service on or before the anniversary date and received in the proper office no later than 20 days after such anniversary date is timely filed. However, that regulation does not alter the anniversary date and where the rental payment arrives within that time period, but in an envelope postmarked after the anniversary date, even though the anniversary date fell on a day on which the

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

proper office to receive payment was closed, the lessee did not exercise reasonable diligence.

William R. Barthold, 98 IBLA 293 (July 20, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

The back rental due when filing a petition for class II reinstatement is determined at the increased rates accruing from the date of termination. The increased rates are the rates which will apply if class II reinstatement is granted: a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases.

Neither 30 U.S.C. § 188(d)-(e) (1982), nor 43 CFR 3108.2-3, expressly require that fees for administrative costs and costs of publication in the Federal Register be submitted when a petition for class II reinstatement is filed or within the time limitation for filing a petition.

R. Gerald Jones, 101 IBLA 57 (Jan. 27, 1988)

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to make a class I reinstatement of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental if the rental payment was not tendered at the proper office within 20 days after the anniversary date.

John P. Lockridge, 101 IBLA 66 (Jan. 27, 1988)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

"Inadvertent." As used in 30 U.S.C. § 188(d) (1982), a failure to timely submit annual rental for an oil and gas lease will be deemed "inadvertent," where the failure was occasioned by forgetfulness or inattention to the requirements of the law. A failure to timely submit the rental will be deemed not to be "inadvertent" only where it is the result of an intentional and knowing choice of the lessee or where the lessee simply lacked the resources to pay the rental.

The back rental due when filing a petition for a class II reinstatement is determined at the increased rates accruing from the date of termination. The increased rates are the rates which will apply if class II reinstatement is granted: a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases.

Torao Neishi, 102 IBLA 49 (Apr. 13, 1988)

A terminated oil and gas lease may be reinstated pursuant to 30 U.S.C. § 188(c) if the full rental is paid within 20 days after the lease anniversary date, provided failure to pay timely was justifiable and not due to a lack of reasonable diligence. Termination for failure to make timely payment occurs despite possession by BLM, in another lease account, of sufficient money to cover the missed payment. Failure of the lessee to make payment within 20 days of the lease anniversary forecloses reinstatement pursuant to 30 U.S.C. § 188(c), where, prior to termination, the lessee has neither directed BLM to transfer funds to cover payment of the annual rental payment nor indicated that it seeks to use funds from another lease account to pay the annual lease rental.

Energy Research Associates, Inc., 102 IBLA 329 (June 3, 1988)

A petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payment was mailed to BLM after the anniversary due date and the lessee has not demonstrated that the misplacement of files during a business move or an illness asserted



# OIL AND GAS LEASES--Continued

## REINSTATEMENT--Continued

as justification for late payment is the proximate cause of late payment.

Raymond H. Keeve, 103 IBLA 352 (Aug. 10, 1988)

Under 30 U.S.C. § 188(c)(1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

Under 30 U.S.C. § 188(c) (1982), the so-called "class I" reinstatement authority, BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met. This restriction applies regardless of the circumstances surrounding the failure to submit the rental timely.

If an oil and gas lease has terminated by operation of law for failure to make timely payment of the annual rental, it may be reinstated pursuant to the provisions of 30 U.S.C. § 188(d) (1982), provided that the failure to pay on time was "inadvertent," and the other requirements are met. A failure to timely submit rental is properly deemed not to be inadvertent only when it is the result of an intentional and knowing choice of the lessee or the lessee lacked the resources to pay the rental. If the lessee has evidently attempted to pay rental, but failed because his payment was lost in the mail, the failure was inadvertent.

Mark Salisbury, 107 IBLA 335 (Mar. 15, 1989)

# OIL AND GAS LEASES--Continued

## REINSTATEMENT--Continued

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. The complexity of the lessee's business affairs will not justify a late payment.

BLM's cashing a late rental check and depositing it in an unearned account does not constitute acceptance of rental payment or a determination that a terminated oil and gas lease will be reinstated.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)



OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

A regulation requiring an increased rental rate of \$2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and the lease has no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Under procedures for class I reinstatement, 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental for an oil and gas lease may be considered justifiable if it is demonstrated that, at or near the anniversary date, there existed sufficiently extenuating circumstances outside of the lessee's control which affected her actions in failing to make timely payment. Mere negligence, forgetfulness, and inadvertence of the lessee in effecting rental timely are not sufficient to warrant class I reinstatement.

Nancy Houston, 109 IBLA 79 (May 31, 1989)

OIL AND GAS LEASES--ContinuedREINSTATEMENT--Continued

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

In petitioning for class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental may be considered justifiable if it is demonstrated that, at or near the anniversary date of the lease, there existed sufficiently extenuating circumstances outside the lessee's control which affected his actions in failing to make timely payment. Neither the fact that the lessee forgot to make the payment nor the fact that he was preoccupied with business matters will justify a late rental payment.

George Foster, 109 IBLA 82 (May 31, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the date it is due will not establish reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day the office is open) as required by the regulation at 43 CFR 3108.2-2(a), 53 FR 17357 (May 16, 1988).

Seth & Alice Swift, 109 IBLA 270 (June 16, 1989)

# OIL AND GAS LEASES--Continued

## REINSTATEMENT--Continued

Under 30 U.S.C. § 188(c) (1982), the class I reinstatement authority, BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 30 days after the anniversary date and other requirements are met. This restriction applies regardless of the circumstances surrounding the failure to submit the rental timely.

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

Under 30 U.S.C. § 188(d), the "Class II" reinstatement authority, BLM may not reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely unless all items required for Class II reinstatement, including an agreement to amend lease terms signed by all lessees of record, are submitted to BLM within 60 days of receipt of the notice of termination in accordance with 43 CFR 3108.2-3(b)(2)(iv).

Discovery Properties, Inc., & Harry Dodson, 112 IBLA 134 (Dec. 4, 1989)

## RELINQUISHMENTS

An oil and gas lease may be relinquished by filing a written relinquishment in the proper BLM office. A relinquishment is effective on the date of its filing with BLM. However, a partial relinquishment filed after the lease has automatically terminated by operation of law is ineffective.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

Where the anniversary date of an oil and gas lease falls on a day when the proper office for payment is not open, a partial rental payment together with a partial relinquishment personally delivered to the proper state office on the next official working day serves to extend that part of the lease covered by the rental payment. A BLM decision finding such a lease to have

# OIL AND GAS LEASES--Continued

## RELINQUISHMENTS--Continued

terminated for failure to pay the full amount of the rental must be reversed.

Monty Cranston, Inc., 86 IBLA 322 (May 16, 1985)

## RENTALS

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

Where first-drawn applicants for simultaneous oil and gas leases violate provisions of 43 CFR 3112.6-1, by failing to submit the first year's advance rental payment in the proper office within 30 days of notice to do so, and by failing to offer payment personally or through an attorney-in-fact, the offers must be rejected.

Satellite 8307193 et al., 85 IBLA 357 (Mar. 25, 1985)

OIL AND GAS LEASES--ContinuedRENTALS--Continued

Where an individual whose application has been drawn with first priority for an oil and gas lease in the simultaneous leasing program fails to submit the signed lease offers or the advance rentals within 30 days of notice by BLM, the application must be rejected, regardless of any justification which the applicant may provide for his failure to timely transmit the documents.

F. Miles Ezell, Sr., 86 IBLA 146 (Apr. 25, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345 (May 16, 1985)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

James D. Creighton, 87 IBLA 79 (May 28, 1985)

Michael R. Diefenderfer, 89 IBLA 366 (Nov. 20, 1985)

Where the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an undefined addition to a known geologic structure, the lessee is required to pay increased rental of \$2 per acre for the entire lease.

Ronald C. Agel, 87 IBLA 255 (June 21, 1985)

OIL AND GAS LEASES--ContinuedRENTALS--Continued

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer. The offeror's absence from his address of record when the notice was received at that address will not excuse noncompliance with 43 CFR 3112.6-1.

Richard L. Knowles, 88 IBLA 120 (Aug. 1, 1985)

Where BLM mails a notice to the first-drawn applicant in a simultaneous oil and gas lease drawing requiring the applicant to execute a lease offer and to tender the first year's rental in accordance with 43 CFR 3112.6-1(a), the failure to return the rental payment and executed lease offer within the 30-day period properly results in rejection of the offer.

Lottery Risk BO, Ltd., 88 IBLA 160 (Aug. 15, 1985)

An oil and gas lease offer is properly rejected where the offer is deficient in the first year's rental by more than 10 percent.

Dorothy L. Davis, 88 IBLA 282 (Sept. 10, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)



# OIL AND GAS LEASES--Continued

## RENTALS--Continued

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

Richard G. Fowler, 89 IBLA 175 (Oct. 11, 1985)

A simultaneous oil and gas lease application is properly rejected where the executed lease forms and first year's rental are not submitted within 30 days of notice to do so as required by 43 CFR 3112.4-1(a) (1982).

Satellite 8211104 et al., 89 IBLA 388 (Nov. 22, 1985)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre pursuant to 43 CFR 3103.2-2(d), if BLM determines during the lease term that any part of the land included in the lease is within a known geologic structure.

Leonard Luning, 90 IBLA 12 (Dec. 3, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

PRM Exploration Co., 90 IBLA 63 (Dec. 10, 1985)  
92 I.D. 617

# OIL AND GAS LEASES--Continued

## RENTALS--Continued

A refund of advance rental payments tendered in connection with a noncompetitive oil and gas lease may be ordered where it is determined after administrative litigation that the lease issued to a party other than the first-qualified applicant and, hence, cancellation is required, if the lessee has been deprived of the benefit of the lease and there has been no intent to defraud the Department and the public.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreement and advance rental within 30 days of receipt of notice to do so, the application is properly rejected.

Janet R. Larson, 91 IBLA 151 (Mar. 25, 1986)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

J. A. Masek dba Masek Oil Co., Barbara B. Sweeney, 92 IBLA 12 (May 6, 1986)

Lewis & Clark Exploration Co., 97 IBLA 171 (May 7, 1987)

Celeste C. Grynberg, 105 IBLA 361 (Nov. 28, 1988)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I

OIL AND GAS LEASES--ContinuedRENTALS--Continued

reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

BLM must cancel a noncompetitive oil and gas lease of acquired lands where the lessee failed to fully pay the first year's advance rental at the time of submission of his lease offer, in accordance with 43 CFR 3103.3-1 (1979), the deficiency was more than 10 percent and a subsequent lease offer was filed by a qualified third party.

Sun Exploration & Production Co., 95 IBLA 140 (Jan. 12, 1987)

Where, following a drawing of simultaneously filed oil and gas lease applications, a first-drawn applicant fails to submit the executed lease agreements within 30 days of receipt of notice to do so, the application is properly rejected.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant

OIL AND GAS LEASES--ContinuedRENTALS--Continued

to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

A simultaneous oil and gas lease application is properly rejected when the executed lease forms are not received by the proper BLM office within 30 days from the date applicant receives the lease forms sent for execution.

Marion Bernice Phillips, 95 IBLA 297 (Jan. 29, 1987)

While a potential assignee of an oil and gas lease may pay the annual rental, BLM is under no obligation to give the potential assignee a courtesy notice of rental due prior to the lease anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

Regulation 43 CFR 3103.2-2(a) requires the holder of a noncompetitive oil and gas lease to pay rental of \$3 per acre or fraction thereof for the sixth and each succeeding lease year.

Dorothy Radant, Robert Radant, 99 IBLA 84 (Sept. 9, 1987)

# OIL AND GAS LEASES--Continued

## RENTALS--Continued

Where a noncompetitive oil and gas lease is terminated for failure to timely make annual rental payments, and rental payments are made after the termination pending a BLM decision on a petition seeking class I reinstatement of the lease, BLM may properly return the rentals as excess payments pursuant to 43 U.S.C. § 1734(c) (1982), once it denies the reinstatement petition. However, in the absence of statutory provisions, no interest may be paid by the Government on such refunds.

Amoco Production Co., 101 IBLA 152 (Feb. 9, 1988)

A terminated oil and gas lease may be reinstated pursuant to 30 U.S.C. § 188(c) if the full rental is paid within 20 days after the lease anniversary date, provided failure to pay timely was justifiable and not due to a lack of reasonable diligence. Termination for failure to make timely payment occurs despite possession by BLM, in another lease account, of sufficient money to cover the missed payment. Failure of the lessee to make payment within 20 days of the lease anniversary forecloses reinstatement pursuant to 30 U.S.C. § 188(c), where, prior to termination, the lessee has neither directed BLM to transfer funds to cover payment of the annual rental payment nor indicated that it seeks to use funds from another lease account to pay the annual lease rental.

Energy Research Associates, Inc., 102 IBLA 329 (June 3, 1988)

Refunds of advance rental payments tendered in connection with noncompetitive oil and gas lease offers which are rejected, are properly issued to an offeror pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982). However, in absence of statutory provisions, no interest may be paid by the Government on such refunds.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

# OIL AND GAS LEASES--Continued

## RENTALS--Continued

When the Bureau of Land Management has determined that any part of the lands described in a noncompetitive oil and gas lease is within an addition to a known geologic structure, the lessee is required to pay an increased rental of \$2 per acre for the entire lease.

Jack J. Grynberg, 104 IBLA 51 (Aug. 24, 1988)

Sinclair Oil Corp., 106 IBLA 33 (Dec. 7, 1988)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure.

Judy P. Clifton, 105 IBLA 319 (Nov. 10, 1988)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre pursuant to 43 CFR 3103.2-2(d) where it determines during the lease term that any part of the land included in the lease is within a known geologic structure.

Winston L. Thornton et al., 106 IBLA 15 (Nov. 30, 1988)

When the rental provision of the lease allows BLM to increase the rental rate upon notice that the leased land has been determined to be within a KGS, a decision by BLM to giving the lessee notice that the land has been included in a KGS is not contrary to the terms of the lease.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)



OIL AND GAS LEASES--ContinuedRENTALS--Continued

Pursuant to 43 CFR 3103.2-2(d), BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental where, during the lease term, any part of the leased land is included within a known geologic structure.

A determination that lands are within a known geologic structure of a producing oil or gas field, based in part on aeromagnetic data, will not be disturbed absent a showing of error by a preponderance of the evidence.

Jack J. Grynberg, 106 IBLA 367 (Jan. 13, 1989)

Where appellant's lease contains provision for increase of rental rate upon reclassification of her leasehold, or any part thereof, within a known geologic structure, both lessor and lessee are bound by the terms of the lease.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

OIL AND GAS LEASES--ContinuedRENTALS--Continued

It is the lessee's responsibility to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating a new lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, the new lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease when the assignor, in tendering annual rental, provides the base lease serial number but fails to identify the new lease by its serial number. BLM properly deems the amount in excess of the payment due on the base lease to be an overpayment on the base lease to be returned to the assignor.

James A. Lynch, Jr., 107 IBLA 253 (Feb. 22, 1989)

Walter T. Clark, Jr., 107 IBLA 257 (Feb. 22, 1989)

It is the responsibility of a lessee to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating the lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, but the lessee includes an incorrect serial number on his payment check, he has not adequately identified his payment, and the lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

# OIL AND GAS LEASES--Continued

## RENTALS--Continued

BLM's cashing a late rental check and depositing it in an unearned account does not constitute acceptance of rental payment or a determination that a terminated oil and gas lease will be reinstated.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

A regulation requiring an increased rental rate of \$2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

In petitioning for class I reinstatement of an oil and gas lease under 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental may be considered justifiable if it is demonstrated that, at or near the anniversary date of the lease, there existed sufficiently extenuating circumstances outside the lessee's control which affected his actions in failing to make timely payment. Neither the fact that the lessee forgot to make the payment nor the fact that he was preoccupied with business matters will justify a late rental payment.

George Foster, 109 IBLA 82 (May 31, 1989)

The automatic termination provisions of 30 U.S.C. § 188 (1982), do not apply to an oil and gas lease which has been committed to a unit, where there is production from a unit well anywhere in the unit.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

# OIL AND GAS LEASES--Continued

## RENTALS--Continued

Where it is determined that lands in a non-competitive oil and gas lease are within an undefined addition to a known geologic structure, the lessee is required to pay an increased rental of \$2 per acre for the entire lease.

Celeste C. Grynberg, 112 IBLA 13 (Nov. 14, 1989)

BLM may properly require the holder of a noncompetitive oil and gas lease to pay an increased rental of \$2 per acre for the entire leasehold pursuant to 43 CFR 3103.2-2(d) (1987), where BLM determines during the lease term that any part of the lands included in the lease is within a known geologic structure of a producing oil or gas field.

An individual who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing, by a preponderance of the evidence, that the determination is in error.

Liberty Petroleum Corp., 112 IBLA 65 (Nov. 21, 1989)

## RIGHTS-OF-WAY LEASES

Lands under a railroad right-of-way issued pursuant to the Act of Mar. 3, 1875, 18 Stat. 482, are not properly leased under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), but instead must be leased under the exclusive authority of the Act of May 21, 1930, 30 U.S.C. §§ 301-306 (1982).

William L. Ahls, 85 IBLA 66 (Feb. 11, 1985)

## ROYALTIES

Where the lessee under an outer continental shelf oil and gas lease diverts gas produced under the lease from buyer A to buyer B in order to fulfill a warranty contract and computes royalty on the basis of the contract price to B, the Minerals Management Service may properly recompute the royalty based on the contract price to A where the price that would have been paid by

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

buyer A represents the reasonable unit value of production under 30 CFR 250.64 (1982), i.e., the highest price which could be received for the gas at the time of production, despite prior approval of use of the warranty contract price for calculation of royalties for gas produced under other leases.

Amoco Production Co., 85 IBLA 121 (Feb. 15, 1985)

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986) 93 I.D. 6

If the Director, Minerals Management Service, erroneously refuses to suspend a decision regarding payment of additional royalties and requires an oil and gas lessee to pay the disputed royalty instead of furnishing a bond, the amount actually paid was "not required" \* \* \* by applicable law" under 43 U.S.C. § 1734(c) (1982), and may be refunded under authority of that provision.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986) 93 I.D. 285

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

Where a decision to assess royalty on vented natural gas fails to specify the extent of the lessee's liability and indicates it will be followed by a specific billing for the amount assessed, it is not a "final" appealable decision and a timely appeal from the billing will preserve the issue of the extent of the liability for vented gas.

F. Howard Walsh, Jr., Mae Lamar Davis & Newton Lamar, 93 IBLA 297 (Sept. 9, 1986)

The Minerals Management Service (MMS) is authorized to issue royalty value determination letters, which will be binding on the Department and the lessee unless and until rescinded or modified by MMS. A royalty value determination letter properly issued by MMS cannot be interpreted in a manner which would result in the delegation of authority for determination of royalty amounts to a lessee. Such a letter must establish the basis for determination in sufficiently specific language to permit the exact basis for determination, and cannot bind the Department to a royalty rate merely because that rate has been approved by the Federal Power Commission.

Amoco Production Co. (On Reconsideration), 94 IBLA 129 (Oct. 9, 1986)

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to buyer A and enters into a transportation agreement with buyer A to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to buyer A as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to buyer A and not warranty contract prices for sale of gas to other buyers.

Amoco Production Co., 96 IBLA 347 (Apr. 8, 1987)



# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)  
94 I.D. 329

The Secretary of the Interior has discretion to suspend overriding royalty interests in excess of 17-1/2 percent pursuant to 43 CFR 3103.3-3. If on appeal an appellant does not show, by a preponderance of available evidence, that rejection of an application for suspension was erroneous the decision rejecting the application will be upheld.

Wood, McShane & Thams, 99 IBLA 132 (Sept. 24, 1987)

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

The Department is authorized to reduce the royalty rate on a lease reinstated pursuant to sec. 401 of the Federal Oil and Gas Royalty Management Act at a higher royalty rate where "there are uneconomic or other circumstances which could cause undue hardship." 30 U.S.C. § 188(i)(2) (1982). Where the lessee has offered evidence that a reinstated competitive lease was extended by drilling over the lease expiration date, that a producing well was subsequently completed, and that the well will never reach payout, a decision rejecting a petition without applying the statutory

# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

criteria will be set aside and remanded for further consideration.

Alta Energy Corp., 100 IBLA 313 (Dec. 28, 1987)

When regulations governing late or erroneous reporting of sales and royalty remittance have been amended to allow reduction of charges for such errors to bring them more in line with the additional administrative costs incurred, absent intervening rights or countervailing public policy reasons, the Board will set aside and remand pending cases on appeal if application of the new regulations will benefit the affected parties.

Conoco, Inc., et al., 102 IBLA 230 (May 18, 1988)

The Minerals Management Service correctly concluded that 30 CFR 202.150(a) precludes the deduction of line losses attributed to the transportation of royalty oil from the wellhead of an Outer Continental Shelf oil and gas lease to an onshore delivery point, as a transportation allowance.

Conoco, Inc., 103 IBLA 108 (July 19, 1988)

MMS is not bound by the terms of a consent agreement in which the lessee and the Department of Energy settle all claims and disputes with regard to overcharges in sales of crude oil. MMS properly ordered the lessee to pay the amount, plus late payment charges, which the lessee had withheld from royalty payments as representing MMS' proportionate share of the settlement amount contained in the consent agreement.

Although MMS is not bound by the terms of a consent agreement in which the lessee and the Department of Energy settle all claims and disputes with regard to overcharges in sales of crude oil from numerous leases, including a Federal lease, the Board will set aside MMS' denial of the lessee's request for a refund of the overcharge allocable to the Federal lease and remand the case for a determination of whether the

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

lessee can show, independently of the consent agreement, whether it is entitled to a refund under 43 U.S.C. § 1734(c) (1982).

Union Texas Petroleum Corp., 103 IBLA 241 (July 26, 1988)

An assessment of late payment charges by MMS cannot be affirmed if the administrative record submitted to the Board of Land Appeals by the Director, MMS, does not contain documents conclusively showing that the lessee failed to pay royalty timely. In the absence of the original payment vouchers duly date stamped to show when they were received (or other suitable proof), it cannot be found through the presumption of regularity that they were not timely filed.

When a notice of appeal to the Board of Land Appeals is filed from a decision of the Director, MMS, MMS is required to submit the complete, original casefile, containing all documents relating to the dispute at hand. Failure to include documents establishing relevant facts may prevent the Board from affirming the decision on appeal.

Dugan Production Corp., 103 IBLA 362 (Aug. 11, 1988)

MMS properly assesses interest charges for the late payment of royalties found to be due on oil and/or gas produced from a Federal onshore oil and gas lease, where payment is made more than 2 months after the end of the month of production and sale, regardless of whether the lessee had an estimated payment on deposit with MMS within that 2-month period and thereafter which would have been sufficient to have paid the total royalty due.

Yates Petroleum Corp., 104 IBLA 173 (Sept. 9, 1988)

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

The United States, as lessor of an oil and gas lease, is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary. Where a party challenges a determination as to the value of gas produced, the party must establish that the methodology used in the Government's computation is, in fact, erroneous.

Sun Exploration & Production Co., 104 IBLA 178 (Sept. 9, 1988)

30 CFR 218.54 authorizes the Minerals Management Service to assess late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of funds due but not paid.

Cities Service Oil & Gas Corp., 104 IBLA 291 (Sept. 14, 1988)

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

The Department is not bound by 30 CFR 250.64 (1979), to value production for royalty purposes according to the contract price. However, when a lessee computes royalty for gas sold under a contract according to the contract price and the Government accepts that valuation, yet rejects that same valuation for unregulated gas transferred to the lessee's refinery under a firm transportation agreement with the contract buyer, such a rejection is improper where the facts show that, in the absence of being transferred to lessee's refinery, such gas would have been required to have been sold to the same buyer according to the same contract price accepted by the Government.

Texaco, Inc., 104 IBLA 304 (Sept. 15, 1988)

# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

Sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a), limits the authority of the Department to refund royalty overpayments to those cases where a refund request is filed within 2 years of making the overpayment.

As a general rule, overpayments of oil and gas royalties for which no claim for refund is filed within 2 years of the overpayment are properly disallowed as an offset or credit against liability for subsequent royalty underpayments.

Mobil Oil Exploration & Producing, S.E., 104 IBLA 399 (Oct. 6, 1988)

A lessee is required to put into marketable condition, if economically feasible, all oil and gas produced from leased lands and conduct operations in such a manner as to prevent avoidable loss of oil and gas. Thus, a lessee is liable for royalty payments on oil or gas lost or wasted from a lease when such loss or waste is due to the lessee's negligence or failure to comply with any regulation or properly issued order or citation.

The Department has the authority to issue NTLs for Federal or Indian leases. NTL-4A specifically governs the calculation of royalties or compensation for oil and gas which is lost by an operator. Under NTL-4A, oil well gas may not be vented or flared unless that activity is approved in writing by an authorized officer. For oil wells completed on or after Jan. 1, 1980, the effective date of NTL-4A, an application must be filed and approval received for any venting or flaring of gas beyond the initial 30-day or otherwise authorized test period. Produced gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the full value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

Lomax Exploration Co., 105 IBLA 1 (Oct. 7, 1988)

# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

The holder of an oil and gas lease of lands on the Outer Continental Shelf issued by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), must pay royalties in accordance with the provisions of the lease. When the lease provides for royalties on "all gas produced and saved or utilized," the lessee is obligated to pay royalties on gas used or flared on the lease.

Where there are divergent views of state officials concerning the interpretation of a provision of a lease maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), the Board will interpret the provision in accordance with general rules for construing contracts. When a royalty clause provides the lessee pay "sums equal to the value of gas produced and saved or utilized at the well, provided no gathering or other charges are made chargeable to lessor," the lessee may not deduct the cost of compressor fuel from royalties paid for gas used or flared on a sec. 6 lease.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Where natural gas produced from Federal and Indian leases is sold under an arrangement where the buyers paid the maximum price allowed under the Natural Gas Policy Act of 1978 and, in addition, reimbursed the producer/seller for the severance taxes it paid to the State of Montana, the gross proceeds received by the producer/seller from the leases consisted of the maximum Natural Gas Policy Act price plus the tax reimbursements. Accordingly, in computing the "value" of the gas produced from these leases, NMS properly determined that the "gross proceeds" to which the royalty rate applied included the purchase price and the tax reimbursements and properly demanded additional royalty and late payment charges where royalty payments had been made using a value that excluded the severance tax reimbursements.

Tricentrol United States, Inc., 105 IBLA 392 (Nov. 30, 1988)



OIL AND GAS LEASES--ContinuedROYALTIES--Continued

The regulation at 30 CFR 206.105(c) (1986), provides that for the purpose of computing royalty, the value of wet gas shall be either the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all commodities, including residue gas, obtained therefrom, whichever is greater. In accordance with that regulation and the other regulations governing gas valuation for royalty purposes, as well as long-standing Departmental practice, wet gas which is not sold at the wellhead because it is unmarketable in that condition, but is processed by an independent third party pursuant to an arm's-length contract, is properly valued for royalty purposes during the period Dec. 1975 through May 1977, in accordance with the terms of that contract, on the value of 100 percent of the dry residue gas at the tailgate of the processing plant and 35 percent of the extracted liquids.

Where the Director, Minerals Management Service, concludes that the proper royalty on gas production from June 1, 1977 through Aug. 31, 1981, is, in accordance with the regulations in 30 CFR Part 206 and Notice to Lessees and Operators No. 1, the greater of the value of the unprocessed gas at the wellhead adjusted for its Btu content or the value of the processed gas and extracted liquids, less allowable processing costs, at the tailgate of the processing plant, yet during that time period Notice to Lessees and Operators No. 5, a duly promulgated regulation of the Department of the Interior, also controlled valuation, the Director's decision may be set aside and the case remanded for consideration of valuation in light of all applicable regulations.

Wexpro Co., 106 IBLA 57 (Dec. 12, 1988)

Where the Director, Minerals Management Service, issues decisions purporting to value gas production from an onshore oil and gas lease for royalty purposes in accordance with the regulations at 30 CFR 206.105, but the record shows that during part of the valuation period the standards in Notice to Lessees and Operators No. 5 were also applicable, and during the remainder of the period, valuation was controlled by an act of Congress (Notice to Lessees Numbered 5 Gas Royalty Act, P.L. 100-234, 101 Stat. 1719 (1988)), passed subsequent to the Director's decisions, the Board may remand the cases to the Director for

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

reconsideration of the proper valuation based upon the regulations in 30 CFR Part 206, Secretarial interpretations thereof, NTL-5, and the act of Congress.

Kerr-McGee Corp., 106 IBLA 72 (Dec. 12, 1988)

In the absence of regulations specifically delineating how service of an invoice by MMS is effectuated, a payor engaged in a business relationship with MMS may specify a particular office or official to whom bills for collection should be directed. Service of an MMS bill for collection is not perfected until receipt by the official previously designated by the payor as the official to whom such notices should be directed.

Coastal Oil & Gas Corp., 106 IBLA 90 (Dec. 13, 1988)

Allowance of setoff of royalty overpayments against royalty underpayments discovered by a Minerals Management Service audit made more than 2 years after the overpayment is confined to the individual lease under audit.

Sun Exploration & Production Co., 106 IBLA 300 (Jan. 5, 1989)

Where natural gas produced from Federal leases is sold under an arrangement where the buyers pay the maximum lawful price allowed under the Natural Gas Policy Act of 1978 and, in addition, reimburse the producer/seller for severance taxes, it paid to the State of Wyoming, the gross proceeds received by the producer/seller from the leases consist of the maximum Natural Gas Policy Act price plus the tax reimbursement. Accordingly, in computing the "value" of the gas produced from these leases, MMS properly determines that the "gross proceeds" to which the royalty rate applies include the purchase price plus the tax reimbursements and properly demands additional royalty and late payment charges where royalty payments were

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

made using a value that excluded the severance tax reimbursements.

Enron Corp., 106 IBLA 394 (Jan. 23, 1989)

An NTL-4A requiring compensation for the venting or flaring of natural gas in the absence of authorization was promulgated in the exercise of the Department's statutory and regulatory authority to require lessees to market oil and gas produced from the lease if economically feasible. A decision of BLM conclusively presuming that gas flared without prior authorization was avoidably lost, will be set aside and the case remanded to determine whether in fact it was economically feasible to market the gas at the time it was flared where BLM has since changed its interpretation of NTL-4A to give the lessee notice and an opportunity to show the gas was not marketable at the time and where it appears this interpretation is consistent with the intent of the underlying statutory and regulatory authority.

Ladd Petroleum Corp., Patrick Petroleum Corp. of Michigan, 107 IBLA 5 (Jan. 24, 1989)

MMS properly assesses late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of the funds due but not paid.

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

Late payment interest charges are properly assessed if royalty payments for oil and gas are underpaid when due.

Dugan Production Corp., 107 IBLA 91 (Feb. 1, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

The Department has the authority to issue NTL's for Federal leases. NTL-4A governs compensation for oil and gas which is lost by an operator. Unless specifically allowed by the provisions of NTL-4A, venting or flaring of oil well gas must be approved in writing by an authorized officer. Unless it can be shown that it was uneconomic to recover the gas at the time it was vented or flared, gas which is vented or flared without prior authorization, approval, avoidably ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

The lessee of a Federal oil and gas lease committed to a communitization agreement providing for the apportionment of production among the leases committed thereto is responsible for payment of royalty to MMS on the share of production allocated to his lease. The lessor's entitlement to a royalty on the allocated share of production from any lessee/operator producing and selling communitized substances from the unit will not diminish the responsibility of the lessee where the operator has defaulted on the royalty obligation.

Jerry Chambers Exploration Co., John M. Beard, 107 IBLA 161 (Feb. 10, 1989)



OIL AND GAS LEASES--ContinuedROYALTIES--Continued

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

Late payment interest charges are properly assessed against payments of royalty made in Feb. and Mar. 1983, for gas produced and removed from a Federal lease from June 1981 through Jan. 1983.

Christmann Energy Corp., 107 IBLA 179 (Feb. 14, 1989)

An assessment for additional royalties and late payment charges is proper where the holder of an operating interest in part of the lands under lease fails to pay royalties at a rate based upon total lease production, notwithstanding the holder's statement that is sought, and did not receive, lease production data from MMS.

Phillips 66 Natural Gas Co. & Phillips Petroleum Co., 107 IBLA 223 (Feb. 21, 1989)

The holder of an Outer Continental Shelf oil and gas lease who timely pays royalty in kind, rather than in money, may not be assessed a late fee pursuant to 30 CFR 218.150(d), even if it failed to accurately report the volume of the production with the result that the United States failed to collect the proper amount of money when it sold that production to third parties.

Mobil Oil Corp., Mobil Oil Exploration & Producing Southeast Inc., 107 IBLA 332 (Mar. 14, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989)  
96 I.D. 127

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

Where BLM issues a decision conclusively presuming that gas flared on a Federal oil and gas lease without prior authorization from BLM was "avoidably lost," and where BLM subsequently issues an instruction memorandum adopting a significant change in the interpretation of BLM policy concerning determinations of whether gas flared from Federal and Indian leases is "avoidably lost" and directing BLM to review all prior determinations of avoidable loss to conform them to the new policy, BLM's decision will be vacated and the



# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

case remanded for further review under the terms of the new policy.

Willard Pease Oil & Gas Co., 108 IBLA 108 (Mar. 29, 1989)

Because oil and gas leases are assessed royalty on an individual basis, offsetting, i.e., crediting overpayments against underpayments, is properly limited to individual lease accounts.

The Minerals Management Service is authorized to impose late payment charges or exact interest as compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

Minerals Management Service is required by law to assess interest (late payment) charges on royalty payments for oil and gas leases which are not received by the date such payments are due.

Nahama & Weagant Energy Co., 108 IBLA 209 (Apr. 19, 1989)

When Minerals Management Service determines value for royalty purposes, the burden to show error in the determination is on the lessee. Absent a showing of error, the determination of items of cost and revenue to be included in a manufacturing allowance are found to be correct.

When a lessee processes gas for recovery of liquid hydrocarbons, pursuant to 30 CFR 206.152 (1986) it must pay royalty either on the value of the wet gas before processing or the value of the residue gas after processing plus the value of the extracted liquids. The allowance which may not exceed two-thirds of the value of the liquids. When calculating the formula to be used for this purpose, it was error to include either

# OIL AND GAS LEASES--Continued

## ROYALTIES--Continued

the cost or value of processing condensate which was not derived from wet gas produced at the plant.

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp. & Mobil Exploration & Producing Services, Inc., 108 IBLA 216 (Apr. 19, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

Where during an appeal from a decision of the Director, MMS, which concluded that the proper value of residue gas for royalty computation purposes is the highest applicable ceiling price for that gas in accordance with NTL-5, Congress enacts the NTL-5 Act, the Board will set aside that decision and remand the case for a recalculation of royalty owed in accordance with that statute.

In determining the value for royalty computation purposes of liquid hydrocarbons and residue gas derived from the processing of wet gas removed from a Federal onshore oil and gas lease, MMS is permitted by 30 CFR 206.106 (1986) to deduct not more than two-thirds of the value of the liquid hydrocarbons as the cost of manufacture in the absence of action by the Secretary increasing the allowance.

BWAB Inc., 108 IBLA 250 (Apr. 25, 1989)

When only a part of a producing oil and gas lease is committed to a unit agreement, the uncommitted portion is segregated into a new lease and given a new lease number. An assessment of late payment charges will be reversed where the royalty was timely paid but initially credited to the account of the parent lease rather than a segregated lease created by partial commitment of the parent lease to a unit agreement and the misidentification was the result of delay in notifying the payor of the segregation and the new lease number for the segregated lands.

Phillips Petroleum Co., 108 IBLA 340 (May 9, 1989)

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to a buyer and enters into a transportation agreement with that buyer to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to the buyer as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to

OIL AND GAS LEASES--ContinuedROYALTIES--Continued

the sale of 10 percent of the production to the buyer, and not on the basis of warranty contract prices for sale of gas to other buyers.

Value for royalty purposes is determined independently of the price at which the commodity was sold. Under 30 CFR 250.64 (1981), 30 CFR 206.150 (1987), the value of production for royalty purposes may not be less than the fair market value.

Amoco Production Co., 108 IBLA 358 (May 15, 1989)

Generally

Where, in its royalty valuation, MMS applies a rate of return based on the prime interest rate on Jan. 1, 1975, but the time for valuation is Jan. 1976 - Dec. 1982, that determination will be set aside.

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was redelivered to the lessee at the end of the pipeline, and the only consideration paid was a \$2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedGenerally--Continued

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Under the regulations in effect at the time that the transportation allowance formula was adopted, the Secretary of the Interior had discretionary authority to determine the factors to be considered when computing transportation allowances for royalty valuation purposes. When it is shown that the Minerals Management Service applied a formula which had been developed after appropriate research and consultation with affected oil companies and the appellant does not provide convincing evidence that a 8-percent rate of return on the undepreciated investment used in the formula was unreasonable, the transportation allowance will be upheld.

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

Under 30 CFR 250.64, the value of production of crude oil produced from a lease issued under the Outer Continental Shelf Lands Act for the purposes of computing royalties may not be less than "gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly determined that "gross proceeds" includes "tertiary incentive revenue" under 10 CFR 212.78 (1980).

Pennzoil Oil & Gas, Inc., 109 IBLA 147 (June 8, 1989)

Crediting within an audit of overpayments against underpayments of royalty on oil and gas leases is properly limited to individual lease accounts. Credits may not be allowed (offset) between unrelated lease accounts because oil and gas leases are individually assessed for royalty due.

Union Oil Co. of California, 110 IBLA 62 (July 20, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedGenerally--Continued

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site, is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation, valuing production by another acceptable method, and demanding payment of royalty based on this method.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

Where the appropriate Oil and Gas Supervisor issues a letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, and that gas is subsequently decontrolled, the letter ceases to be a valid basis for the computation of the amount of royalty due to the United States.

As a general rule, "reasonable value" for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is higher.

Where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of the production from the lease, though claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Where, however, for no justifiable reason, a lessee fails to timely invoke a clause permitting renegotiation of the price



OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedGenerally--Continued

received with the result that royalties continue to be based on a lower price, the lessee is properly required to tender additional royalties based on the prices received by other lessees who timely invoked similar renegotiation provisions.

Where a Federal oil and gas lessee voluntarily agrees to reduction in the price paid for oil or gas by an affiliated purchaser, and the evidence establishes that, but for the affiliated relationship between the lessee and the purchaser, a higher price would have been obtained for the production, the lessee is properly deemed to have breached its duty of fair dealing with the lessor and royalty is properly computed based on the prices received by other lessees who had similar contractual arrangements with the producer but who refused to assent to lower payments for their production from the same lease.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

The offsetting of overpayments of royalty on natural gas production from an offshore oil and gas lease against underpayments of royalty may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Chevron U.S.A. Inc., 111 IBLA 92 (Sept. 26, 1989)

For the purpose of computing royalties under 30 CFR 206.150 (1987), the value of gas produced from leases issued under the Outer Continental Shelf Lands Act may not be less than "the gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly refuses to allow a lessee to deduct the lessee's costs of hiring a third party "marketer" (to find buyers, negotiate sales contracts, and monitor the sales of the produced gas) from gross proceeds.

Walter Oil & Gas Corp., 111 IBLA 260 (Oct. 25, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedGenerally--Continued

The assessment of additional royalty due as a result of the improper deduction of a transportation allowance discovered during an audit may be affirmed where the improper deduction commenced prior to the period of the audit in the absence of evidence of a prior audit or adjudication of royalty due under the lease which dealt with the issue.

Forest Oil Corp., 111 IBLA 284 (Oct. 26, 1989)

Where a Federal oil and gas lessee paid royalty on the value of production which was less than "gross proceeds accruing to the lessee from the disposition of the produced substances," an underpayment of royalty was made in violation of 30 CFR 206.150 (1987). Although the underpayment was erroneously authorized to be made, the Department was not estopped from correcting its error and collecting the correct payment.

Shell Offshore Inc., 111 IBLA 350 (Nov. 2, 1989)

The existence of changed market conditions is insufficient to alter the scope of a Federal lessee's duty to market gas. Where a lessee contracts with a marketing agent to find buyers for unprocessed gas production off the lease, lessee is not entitled to an allowance for this marketing cost, as such costs necessarily are incurred in the lessee's duty to prudently market production, regardless of where the market is located.

Arco Oil & Gas Co., 112 IBLA 8 (Nov. 9, 1989)

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas liquid products.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedGenerally--Continued

to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp., 112 IBLA 198 (Dec. 13, 1989)

Costs incurred in placing crude oil into a marketable condition are costs of production and generally not deductible for royalty purposes, so that the proper basis for royalty valuation is the crude oil after it has been rendered marketable, not as it comes from the well.

Davis Exploration, 112 IBLA 254 (Dec. 28, 1989)

Interest

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline to entertain arguments directed to MMS' authority to assess interest.

MMS is required by 30 CFR 218.54(a) and 30 CFR 218.150(c) to assess interest for late payment of royalties from the date the royalties were due. Arguments that interest should be assessed from the date the lessee was notified of the underpayment or from the date the lessee received payment from the purchaser of the products are properly rejected.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedInterest--Continued

MMS is authorized to impose an interest charge where it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of production of wet gas.

Where a royalty payor submits funds to MMS in response to a demand for alleged underpayments of royalties, and MMS subsequently refunds a portion of those funds, the payor is not entitled to interest on the refunded amount.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

MMS was authorized to assess interest charges for the late payment of royalty owned with respect to onshore and offshore oil and gas leases prior to enactment of sec. 111(a) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (1982).

Appellant's argument that promulgation of late payment interest assessment regulations failed to comply with the notice and comment provisions of 5 U.S.C. § 553 (1982), is moot as the appropriate remedy has already been provided.

MMS properly assesses interest charges for the late payment of royalty where the lessee fails to establish that no late payment occurred because overpayments exceeded underpayments with respect to a particular lease account.

Mesa Petroleum Co., 111 IBLA 201 (Oct. 12, 1989)

MMS properly assesses interest for a late payment of royalty on a Federal offshore lease where the late payment is due to the fact that the lessee mistakenly pays the royalties due on that lease into another lease account.

FMP Operating Co., 111 IBLA 377 (Nov. 8, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedInterest--Continued

An assessment of interest charges for late payment of royalty pursuant to the regulation at 30 CFR 218.54(a) will be upheld on appeal where the error in payment resulted from a defect in the manufacture of the metering equipment used to measure production. The fact that the defect was caused by the negligence of a third party (the manufacturer) and was not readily apparent to the lessee will not absolve the lessee of liability for accurate measurement of production and payment of interest on any royalty thereon not timely paid.

Cotton Petroleum Corp., 112 IBLA 1 (Nov. 8, 1989)

MMS properly assessed late payment interest charges where a late royalty payment was made by an oil and gas lessee's bank using electronic funds transfer 1 day after payment was due.

Union Exploration Partners, Ltd., 112 IBLA 140 (Dec. 4, 1989)

Natural Gas Liquid Products

Where it is MMS policy to accept the Department of Energy ceiling prices for natural gas liquid products as representing fair market value for royalty purposes in certain instances, and MMS has followed that policy in a number of cases, its refusal in another case to accept those ceiling prices, in favor of a weighted average price that the royalty payor paid for other liquids which it purchased, is arbitrary and capricious.

Where the actual costs of processing wet gas are less than two-thirds the value of the natural gas liquids produced, calculation of a processing allowance based on actual costs, rather than that two-thirds value, pursuant to 30 CFR 221.51 (1976), will be affirmed.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedNatural Gas Liquid Products--Continued

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232 (Aug. 29, 1989)

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Where royalty payments made by an oil and gas lessee were based on values lower than values for



OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedNatural Gas Liquid Products--Continued

actual sales of the products in question, assessment for underpaid royalty was properly made.

It was premature to assess late payment charges while the principal amount of royalty owed by a lessee remained to be determined on appeal and where the requirement to pay pending appeal was stayed until final decision concerning the principal amount owed could be issued.

Union Oil Co., Union Exploration Partners, Ltd.,  
111 IBLA 369 (Nov. 7, 1989)

In valuing, for royalty computation purposes, natural gas liquid products processed and sold under non-arm's-length contracts in Louisiana, MMS may properly compare the prices reported by the lessee to published spot market prices for similar products in Texas where the lessee fails to establish that its prices are reflective of fair market value received under arms's-length contracts. However, where the reported prices fall below the lowest spot market price constituting the fair market value floor, MMS may not value production according to an average spot market price.

Mobil Oil Corp., 112 IBLA 56 (Nov. 21, 1989)

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

In accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, MMS will normally accept a non-arm's-length contract price for royalty purposes where the lessee can show that the non-arm's-length contract has characteristics similar to arm's-length contracts which represent fair market value. The fact that third party contracts include a deduction for marketing costs does not discredit the arm's-length nature of those contracts or establish that the price is not fair market value. Nevertheless, where that price reflects deductions that may not be made in determining value for Federal royalty purposes, such

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedNatural Gas Liquid Products--Continued

deductions may be added to the contract price to derive the value of production for royalty computation.

Pursuant to 30 CFR 250.64 (1982), the value of production shall not be less than gross proceeds. Consequently, a lessee is not entitled to a credit for those months, when its price for natural gas liquid products is above the yardstick range established by the Procedure Paper on Natural Gas Liquid Products Valuation offsetting those months when its price was below that range.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Where MMS utilizes spot market prices to determine the value of the production of ethane for royalty purposes and the lessee shows that during the period in question the price for the majority of ethane produced from the field or area was determined on the basis of quarterly contracts, not spot market prices, the lessee has established that MMS was not justified in using spot market prices for ethane.

Pursuant to 30 CFR 250.67(d) (1982), no allowance is available for expenses incidental to marketing natural gas liquid products, and since a lessee has a duty to market its production, it must bear the expenses incurred in discharging that obligation.

Amoco Production Co., 112 IBLA 77 (Nov. 22, 1989)

When the lessee's price for natural gas liquid products is less than the minimum yardstick value established in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, it is improper for MMS to utilize the average of the high and low prices in the yardstick range to determine the value

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedNatural Gas Liquid Products--Continued

of production. The yardstick minimum should be the price employed in such a situation.

Cities Service Oil & Gas Corp., 112 IBLA 89 (Nov. 24, 1989)

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Mobil Oil Corp., 112 IBLA 198 (Dec. 13, 1989)

Payments

Late payment interest charges are properly assessed if royalty payments for oil and gas leases are underpaid when due.

The Associate Director, MMS, has considerable latitude in determining the value of production for the purpose of computing royalty and he properly requires a lessee to remit royalty on the basis of the price the lessee could have obtained for a certain category of gas where such price was higher than the price for which the lessee actually sold the gas.

Dugan Production Corp., 111 IBLA 181 (Oct. 6, 1989)

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

Where royalty payments made by an oil and gas lessee were based on values lower than values for

OIL AND GAS LEASES--ContinuedROYALTIES--ContinuedPayments--Continued

actual sales of the products in question, assessment for underpaid royalty was properly made.

It was premature to assess late payment charges while the principal amount of royalty owed by a lessee remained to be determined on appeal and where the requirement to pay pending appeal was stayed until final decision concerning the principal amount owed could be issued.

Union Oil Co., Union Exploration Partners, Ltd., 111 IBLA 369 (Nov. 7, 1989)

Processing Allowance

Where the actual costs of processing wet gas are less than two-thirds the value of the natural gas liquids produced, calculation of a processing allowance based on actual costs, rather than that two-thirds value, pursuant to 30 CFR 221.51 (1976), will be affirmed.

Where MMS is valuing production from onshore oil and gas leases at the tailgate of the processing plant for the period from 1976-1982, the costs of gathering and compressing wet gas for movement to the plant are not expenses incidental to marketing within the meaning of 30 CFR 221.51(b) (1976), nor are they expenses that may be included as part of the manufacturing or processing allowance; however, the costs associated with moving the gas from the field to the processing plant may be separately deductible as a transportation allowance.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

STIPULATIONS

Where an oil and gas lessee does not protest or appeal a special stipulation added by BLM to a permit to drill within 30 days after notice thereof, the

## OIL AND GAS LEASES--Continued

### STIPULATIONS--Continued

lessee cannot be heard to complain about the stipulation as long as BLM's interpretation of the stipulation is reasonable.

Where the Board determines that the plain language of a stipulation in a permit to drill is clear and unambiguous in its imposition of liability on the operator if a specified archaeological site is altered, BLM must be affirmed in its enforcement of the stipulation.

Beartooth Oil & Gas Co., 85 IBLA 11 (Jan. 30, 1985)  
92 I.D. 74

Under the Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1982), if the lands embraced within an oil and gas lease application are under surface jurisdiction of a service or bureau within the Department of the Interior, such as the Bureau of Reclamation, the consent of the Secretary of the Interior is necessary under the Act for leasing of the land.

Robert J. Shorney, 88 IBLA 61 (July 22, 1985)

When Congress speaks on a specific matter in the administration of Federal mineral leasing, it thereby defines the public interest and accordingly limits the Secretary's discretion with respect to that matter. A lease stipulation purporting to require a lessee to waive the right of assignment is inconsistent with sec. 30a of the Mineral Leasing Act.

Clarification of Secretarial Authority to Restrict the Size of Oil & Gas Lease Assignments, M-36778 (Supp.) (Aug. 13, 1984)  
92 I.D. 121

Where an oil and gas lease offeror is notified he is allowed 30 days to execute restrictive stipulations as a condition to issuance of an oil and gas lease by the Department and is informed that failure to do so will result in rejection of the offer, there is no right to appeal that notice. It is not a final

## OIL AND GAS LEASES--Continued

### STIPULATIONS--Continued

Departmental decision from which an appeal may be taken.

James M. Chudnow, Laurent A. Giesbert, Jean-Christophe Giesbert, 89 IBLA 361 (Nov. 20, 1985)

The Secretary of the Interior has the discretionary authority to require the execution of special stipulations as a condition precedent to issuance of oil and gas leases for land which is located in a national forest in order to protect environmental and other land use values. In the exercise of that authority BLM may establish a reasonable time limit of 30 days from receipt of notice for an over-the-counter lease offeror to submit a signed lease with the required stipulations. Where the offeror does not object to the stipulations, and files them with BLM in advance of a decision rejecting the offer but after the 30-day period allowed for filing, BLM should consider whether the late filing ought not be accepted under the provisions of 43 CFR 1821.2-2(g).

Bill Mathis et al., 90 IBLA 353 (Feb. 26, 1986)

The Bureau of Land Management is not authorized to reject conditions imposed by the United States Forest Service upon acquired land managed by the Forest Service pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (1982). Where an oil and gas lessee objects to provisions of an apparent attempt by the Forest Service to condition the terms of his oil and gas lease on acquired land, agencies of the Department of the Interior may not adjudicate the validity of the challenged conditions.

James M. Chudnow, 91 IBLA 143 (Mar. 24, 1986)

The Bureau of Land Management may properly reject an over-the-counter noncompetitive oil and gas lease offer when special stipulations are not executed and filed with it within the time limit specified.

William H. Kerlin, Jr., 95 IBLA 377 (Feb. 19, 1987)



OIL AND GAS LEASES--ContinuedSTIPULATIONS--Continued

Where a Notice of Sale of competitive leases expressly notes that a particular parcel will be subject to special stipulations designed to protect big game winter range habitat and the precise nature of the restrictions would be made clear upon inquiry to the State Office as provided by 43 CFR 3120.4-1, an offeror will be deemed to have agreed to accept such stipulation even though it was not specifically described in the Notice of Sale.

Exxon Corp., 97 IBLA 330 (May 21, 1987)

When approving applications for permit to drill on an existing acquired lands oil and gas lease, BLM may properly impose seasonal restriction stipulations on drilling in order to protect an endangered species of bird and, at the behest of the surface managing agency, to preclude drilling during the flood season.

Prado Petroleum Co., 103 IBLA 247 (July 26, 1988)

Under sec. 306 of the Act of Sept. 28, 1984 (the Utah Wilderness Act), Congress authorized BLM to issue leases for carbon dioxide gas in five areas within the Escalante KGS, subject to express restrictions on "exploration" and "development." Where BLM offers the areas for lease subject to a stipulation that fails adequately to enforce the statutory restrictions, and where BLM imposes this stipulation on only three of these five areas covered by sec. 306 of this Act, BLM's decision to receive bids on these areas will be set aside and the case remanded for issuance of leases of the five areas without the stipulation.

Southern Utah Wilderness Alliance et al., 108 IBLA 318 (Apr. 28, 1989)

BLM may properly require a reasonable contingency plan for salinity control in stipulations to a permit for surface discharge of water pursuant to the provisions of Notice to Lessees and Operators of Federal and Indian Oil and Gas Lessees (NTL-2B) and the regulations in 43 CFR 3162.5-1 which control disposition of water produced during production of oil

OIL AND GAS LEASES--ContinuedSTIPULATIONS--Continued

and gas on Federal lands. NTL-2B sets forth requirements for handling, storage, or disposal of water produced from oil and gas wells with which all lessees must comply. Methods of water disposal used by a lessee must be approved by BLM.

A. G. Andrikopoulos Oil & Gas Properties, 108 IBLA 369 (May 17, 1989)

If the successful bidder for a competitive oil and gas lease elected to execute a special stipulation required by BLM rather than appealing the decision requiring the stipulation, failure to appeal that decision renders it final and precludes the lessee from contending, in a later appeal brought from action by BLM enforcing the stipulation, that the requirement was not properly imposed.

George A. Haddad, Jr., 109 IBLA 394 (June 26, 1989)

STOCK-RAISING HOMESTEAD ACT OF 1916

A nationwide bond filed pursuant to 43 CFR 3045.4 by a party planning to conduct geophysical exploration for oil and gas on lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 291-301 (1970) does not satisfy the requirements of sec. 9 of the Stock-Raising Homestead Act. 43 CFR Part 3045 is applicable only to those cases where the surface of the lands to be explored is owned by the United States and administered by the Secretary of the Interior through the Bureau of Land Management.

Gary Maughan, 105 IBLA 206 (Nov. 2, 1988)

SUSPENSIONS

Where a blizzard prevented a drilling rig from reaching a drill site in time to begin operations before the Nov. 30 expiration date of the lease, and a lease suspension was therefor granted effective Nov. 1 to "terminate automatically on the first of the month in which actual approved drilling operations are commenced," and such operations were commenced on

OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

Dec. 7, the new expiration date of the initial lease term was Dec. 31. Because the resultant dry hole was drilled, finished, plugged, and abandoned by Dec. 25, no drilling operations were in progress at the close of Dec. 31, and the lease expired. The drilling operations previously concluded did not qualify the lease for a 2-year extension.

Milestone Petroleum, Inc., Phillips Oil Co., 85 IBLA 96 (Feb. 14, 1985)

A suspension of operations and production under sec. 39, which by law extends the term of the lease for the period of suspension, must be a suspension of both operations and production such that the lessee has been denied beneficial use of the lease by the Department in the interest of conservation. Lease activity (operations or production) is beneficial use and may not be allowed to commence or continue while the lease is suspended.

Sec. 25 of the standard form unit agreement, 43 CFR 3186.1, only relieves the unit operator from compliance with unit drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the unit operator must still obtain a sec. 39 suspension, and must comply with the requirements of sec. 39, in order to prevent leases from expiring while he is excused from unit requirements.

Suspensions of operations or of production under sec. 17(f) toll the running of the lease term but do not suspend the payment of rental or minimum royalty.

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be

OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

granted or directed in a manner consistent with the law as interpreted in this memorandum.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985)  
92 I.D. 293

The Secretary of the Interior may properly delegate the authority to suspend oil and gas leases, and, the party to whom this authority is delegated may act on behalf of the Secretary in approving applications for suspension.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290 of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

The granting of an application for suspension of an oil and gas lease rests in the discretion of the authorized officer. Where, however, the application for suspension does not contain the agreement of the lessee of record assenting to the request, the application does not comply with 43 CFR 3165, and may not be granted.

Lario Oil & Gas Co., 92 IBLA 46 (May 9, 1986)



OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

Where oil and gas leases issued after enactment of the Federal Land Policy and Management Act of 1976, are located within a wilderness study area, are subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability and are denied applications for permit to drill for failure to meet the nonimpairment standard, the denial itself is not a restriction which is tantamount to a suspension under 30 U.S.C. § 209 (1982).

Amoco Production Co. et al., 92 IBLA 333 (June 30, 1986)

When an oil and gas lease of lands located within a wilderness study area is issued after enactment of the Federal Land Policy and Management Act of 1976, subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability, and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, the denial is not a restriction tantamount to a suspension under 30 U.S.C. § 209 (1982).

Beartooth Oil & Gas Co., 94 IBLA 115 (Oct. 9, 1986)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

Where an oil and gas lease, issued after the enactment of the Federal Land Policy and Management Act of 1976, embraces lands within a wilderness study area and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, a subsequent request for suspension of operations and production will be adjudicated on the basis of whether or not at the time of issuance BLM encumbered the lease with a wilderness protection or no-surface-occupancy stipulation. The suspension policy, as set forth in the "Interim Management Policy and Guidelines for Lands under Wilderness Review," is to grant a suspension for such a lease issued without either of those stipulations.

Amoco Production Co., et al. (On Reconsideration), 96 IBLA 260 (Mar. 26, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature in the absence of an adjudication of the request for suspension.

The Secretary of the Interior is authorized to suspend oil and gas leases in the interest of conservation where action cannot be taken on an application because of the time needed to comply with requirements of the National Environmental Policy Act of 1969. Where the lessee's inability to commence drilling prior to lease expiration cannot be attributed to any order, delay, or inaction by any Federal agency, the Secretary is not obligated to grant a suspension but has the discretion to do so in the exercise of his informed discretion upon a finding that it is in the interest of conservation.

John March, 98 IBLA 143 (June 22, 1987)



OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

The Secretary of the Interior has the discretionary authority to suspend an oil and gas lease in the interest of conservation where drilling under prevailing conditions would damage the lease environment. Although a suspension of operations may be granted retroactively after the lease expiration date, a prerequisite is an application filed prior to the expiration of the lease. In the absence of a timely filed application, there is no lease in existence which may be suspended.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

Even when the doctrine of commercial impracticability is applicable, it may be invoked only where a party first establishes the factual basis for doing so. Therefore, where a unit operator fails to establish the necessary facts, the Board will decline to determine whether or not, in the proper circumstances, commercial impracticability could serve to waive diligent drilling requirements as set forth in a unit agreement.

Koch Exploration Co., 100 IBLA 352 (Jan. 12, 1988)

BLM may properly decline to approve a request by an oil and gas lessee for a suspension of production where the lessee fails to furnish information required by 43 CFR 3103.4-2 showing the necessity for such relief.

Prima Exploration, Inc., 102 IBLA 352 (June 9, 1988)

When the Secretary directs or consents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, the lessee is denied all beneficial use of the lease, including production. "Beneficial use" refers to all operations under the lease except for those necessary to maintain or preserve the well or mine workings, to conduct reclamation work or to protect the

OIL AND GAS LEASES--ContinuedSUSPENSIONS--Continued

leased lands, natural resources, or public health and safety.

Congress provided two forms of relief when the Secretary directs or assents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209 - extension of the "term" by the period of suspension and elimination of annual rent during the suspension.

"Term." The term of a lease issued pursuant to the Mineral Leasing Act, when used without limitation as in sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, includes all periods of time between the effective date and the expiration date and means the entire estate demised by the lease.

A suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, is clearly a relief provision and must be liberally construed. By extending the term of the lease by the period of the suspension, Congress intended that the lessee should have exactly the same contract with exactly the same term but with a later maturity date.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

An application for suspension of an Outer Continental Shelf oil and gas lease made pursuant to Minerals Management Service Release No. 86-12 will properly be denied if the party seeking the suspension is not the designated operator and the application has not been filed by all lessees. Suspensions pursuant to that release were to be granted only upon a showing of both an inability to obtain the necessary NPDES permits during the period between June 30, 1984, and July 2, 1986, and a showing that the delay in exploration activities was a result of this inability. The application required that the applicant attest to this fact, and absent a joint attestation by all lessees, the only party able to attest to these facts is the operator.

Chevron U.S.A., Inc., 103 IBLA 296 (Aug. 3, 1988)

## OIL AND GAS LEASES--Continued

## SUSPENSIONS--Continued

BLM properly denies a request for the suspension of operations and production under an oil and gas lease where an application for a permit to drill on the lease was filed less than 30 days prior to the lease expiration date, the application was processed expeditiously and approved by BLM prior to that date, and there is no basis to conclude that a suspension was necessary in the interest of conservation.

NevDak Oil & Exploration, Inc., 104 IBLA 133 (Sept. 2, 1988)

Under sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), the Secretary of the Interior is obligated to grant a suspension of operations and production where the Secretary takes some action or fails to act such as to prevent a lessee from commencing drilling operations during the primary or extended term of its lease. Where an oil and gas lessee asserts entitlement to such a suspension, but there is no evidence in the record that from the time the lessee obtained a 2-year lease extension by drilling over until expiration of the lease BLM in any way prevented the lessee's activities on the lease, BLM's decision denying the request will be affirmed.

Bronco Oil & Gas Co., 105 IBLA 84 (Oct. 19, 1988)

When the Secretary directs or consents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act of 1920, 30 U.S.C. § 209 (1982), the lessee is denied all beneficial use of the lease during the period of suspension. The existence of litigation involving whether an oil and gas lease was issued in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4334 (1982), and sec. 7 of the Threatened and Endangered Species Act, 16 U.S.C. § 1539 (1982), does not amount to the denial of beneficial use of the lease, absent an injunction against activity under the lease. In such a case, BLM properly denies a request for a suspension.

Paul C. Kohlman, 111 IBLA 107 (Sept. 28, 1989)

## OIL AND GAS LEASES--Continued

## SUSPENSIONS--Continued

Sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), authorizes suspension of operations and production under an oil and gas lease for the time needed to comply with the National Environmental Policy Act. An approved suspension becomes effective on the first of the month in which the completed application was filed with the authorized officer, suspends the obligation to pay rental, and extends the terms of the lease for the suspension period.

Stephen G. Moore, 111 IBLA 326 (Oct. 31, 1989)

## TERMINATION

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

A petition for reinstatement of a terminated oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), must be filed on or before the earlier of (1) 60 days after the lessee received notice of termination, or (2) 15 months after termination of the lease. Where the lessee receives a notice of termination and fails to file a petition within 60 days, reinstatement is properly denied.

Jerry D. Powers, 85 IBLA 116 (Feb. 15, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)



OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Leases reinstated pursuant to 30 U.S.C. § 188(d) (1982) shall be subject to the conditions contained in 30 U.S.C. § 188(e) (1982).

Charles F. Egger, John E. Jones, Jimmy R. Lynn II,  
85 IBLA 385 (Mar. 27, 1985)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the lessee was merely financially unable to pay the rental when due.

In order to qualify for class II reinstatement, the lessee must establish that the failure to timely pay was inadvertent. An inadvertent act involves carelessness, oversight, mistake, or the failure to pay careful and prudent attention to a situation. A lessee's failure to timely pay rental is not inadvertent where the lessee was merely financially unable to pay the rental when due.

Dena F. Collins, 86 IBLA 32 (Apr. 3, 1985)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

When the lessee fails to pay rentals on or before the anniversary date of the lease, and no oil or gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(b) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Edgar B. Stern, 86 IBLA 72 (Apr. 10, 1985)

Where rental payment for an oil and gas lease with a June 1 anniversary date is postmarked May 31 and received in the proper office on June 5, under 43 CFR 3108.2-1(a) such action may constitute reasonable diligence for purposes of class I reinstatement; however, where the payment is less than the full amount and the lessee fails to pay the full amount within 20 days after the anniversary date, class I reinstatement is precluded.

James & Lillian Chudnow, 86 IBLA 315 (May 14, 1985)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to reinstate a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

J. Edward Hollington, Richard H. Peterson, 86 IBLA 345  
(May 16, 1985)



OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. § 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of \$5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Hugh Carter Crutchfield Trust, 87 IBLA 27 (May 22, 1985)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease shall automatically terminate by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable diligence. Therefore, a petition for reinstatement under 30 U.S.C. § 188(c) (1982) must be rejected.

Freedom Oil Co., Inc., 87 IBLA 71 (May 28, 1985)

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Under 30 U.S.C. § 188(d), (e) (1982), a noncompetitive oil and gas lease terminated automatically for untimely payment of annual rental may be reinstated if the petitioner shows that failure to pay timely was inadvertent and submits within 60 days from receipt of notice of termination a petition for reinstatement

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

together with the required back rental accruing from the date of termination. Petitioner must also agree to increased rental and royalty rates and submit a reinstatement fee and Federal Register publication costs.

Donald D. Dunn, 87 IBLA 316 (June 25, 1985)

Under 30 U.S.C. § 188(c) (1982), the Department has no authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Otto C. Svancara, Grete Svancara, 87 IBLA 319 (June 25, 1985)

Where the record shows that at the end of the primary term of an oil and gas lease, there is no production of oil or gas in paying quantities from the lease area, and no well capable of such production, the lease expires at the end of its term in the absence of diligent drilling operations initiated prior to the expiration or suspension of the lease.

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand), 88 IBLA 172 (Aug. 20, 1985)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Under 30 U.S.C. § 188(c) (1982), the Secretary is without authority to reinstate an oil and gas lease terminated by operation of law for failure to pay annual rental timely where the lessee fails to submit the full amount of rental due within 20 days of the anniversary date of the lease.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

Wayne J. Stastny, 90 IBLA 357 (Feb. 27, 1986)

A person who wishes to appeal from a determination that an oil and gas lease has terminated by operation of law for failure to submit the rental amount due must file a notice of appeal within 30 days after the date of service of the determination. If an appellant fails to file a timely notice of appeal in accordance with 43 CFR 4.411, the issue of termination will not be considered in an appeal from a subsequent decision denying petition for reinstatement.

Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

PRM Exploration Co., 90 IBLA 63 (Dec. 10, 1985)  
92 I.D. 617

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable because he was moving from Texas to California a month before the payment was due and there was a delay in receipt of the rental billing notice.

Melvin P. Clarke, 90 IBLA 95 (Dec. 23, 1985)

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Luceal Robert, 90 IBLA 182 (Jan. 23, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

BLM may properly condition class II reinstatement, under 30 U.S.C. §§ 188(d) and (e) (1982), of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental upon tender of the required back rental, computed at the increased rate of \$5 per acre set forth in 30 U.S.C. § 188(e)(2) (1982), within 60 days after receipt of a notice of termination.

Monica V. Rowland, 90 IBLA 349 (Feb. 26, 1986)

When the lessee fails to pay rental on or before the anniversary date of the lease, and no oil and gas in paying quantities is being produced on the leased premises, the lease automatically terminates by operation of law pursuant to 30 U.S.C. § 188(b) (1982). The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence. When the failure to timely pay the rental was due to the lessee's own neglect, the failure to timely pay is neither justifiable nor demonstrative of reasonable

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

diligence, and a petition for reinstatement under 30 U.S.C. § 188(c) (1982) is properly rejected.

Under 43 CFR 3108.2-1(b), if the rental payment due under a lease is paid on or before its anniversary date but the amount of the payment is deficient and the deficiency is nominal, the lease shall not automatically have terminated, unless the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency required to be sent by BLM.

PRM Exploration Co., 91 IBLA 165 (Mar. 26, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law where the annual rental is not paid on or before the lease anniversary date. Although an assignment of 100 percent of record title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases, this is not true of an assignment of operating rights, and timely payment of the rental for the entire lease acreage is required to maintain the lease.

Albert D. Fleck, Carl J. Williams, William L. Medallie, 91 IBLA 187 (Mar. 31, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Herbert J. Stinnett, Lois C. Stinnett, 91 IBLA 239 (Apr. 8, 1986)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Where an oil and gas lessee's annual rental payment was postmarked on the Monday following the anniversary date of the lease which fell on the preceding Sunday, the payment was not timely under the provisions of 43 CFR 3108.2-1(a), even though, under the regulation, the lease payment could have been timely received by BLM on the Monday upon which payment was postmarked. Mailing was not made the equivalent of actual payment nor was the anniversary date of the lease changed by the regulation, which permits payment on the next day following a lease anniversary when the office where payment is to be made is closed on the anniversary date.

Nancy Wohl, 91 IBLA 327 (Apr. 17, 1986)

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a class I reinstatement of a terminated oil and gas lease where the rental payment is not tendered at the proper office within 20 days after the due date.

Reinstatement of a terminated noncompetitive oil and gas lease under sec. 401 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 188(d), (e) (1982), requires payment by the lessee of rental at the rate of \$5 per acre as well as reimbursement of administrative costs (up to \$500) and the cost of publishing notice in the Federal Register.

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

A decision rejecting a request by an assignee for approval of a partial assignment of an oil and gas lease will be affirmed where the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental



OIL AND GAS LEASES--ContinuedTERMINATION--Continued

required for the lands described in the partial assignment prior to the anniversary date.

Ruth L. Schwoerer, 92 IBLA 98 (May 28, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil or gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Ann L. Rose, 92 IBLA 308 (June 26, 1986)

Under 30 U.S.C. § 188(c) (1982), BLM has no authority to reinstate an oil and gas lease terminated automatically for nonpayment of annual rental where the rental payment was not tendered at the proper office within 20 days after the anniversary date.

Edward R. Finch, 92 IBLA 330 (June 30, 1986)

Pursuant to 30 U.S.C. § 188(b) (1982), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and no oil and gas is being produced on the leased premises, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence.

Late payment of annual rental may be considered justifiable if the untimeliness was proximately caused by extenuating circumstances outside the lessee's control at or near the anniversary date. A lessee's failure to timely pay rental is not justifiable where the rental payment was returned by the U.S. Postal

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Service as undeliverable because the address on the envelope was unreadable. Appellant must bear the consequences of the Postal Service's inability to timely deliver the rental payment.

Mailing the rental payment after the anniversary date does not constitute reasonable diligence.

Neal Hunter, 93 IBLA 80 (July 16, 1986)

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

A petition for reinstatement of noncompetitive oil and gas leases filed pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payments were mailed to BLM after the lease anniversary dates and the illness asserted as justification for late payments is not substantiated as being the proximate cause of the late payments.

Larremore Petroleum Partnership, 94 IBLA 30 (Sept. 25, 1986)

Where a Federal oil and gas lessee fails to submit payment of annual rental within 20 days following the anniversary date of her lease, the Department lacks authority pursuant to 30 U.S.C. § 188(c) (1982), to reinstate her oil and gas lease which was terminated by operation of law for her failure to timely pay rental on or before the anniversary date of the lease.

Anna Beitman, 94 IBLA 148 (Oct. 21, 1986)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities automatically terminates by operation of law if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1982). Under 30 U.S.C. § 188(c) (1982), the Department of the Interior has no authority to make a Class I reinstatement of a terminated oil and gas lease where the rental payment is not paid or tendered at the proper office within 20 days after the due date.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

An oil and gas lease on which there is no well capable of production in paying quantities terminates automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date. Where no rental is tendered timely either for the entire lease or for the acreage embraced in a pending unapproved assignment of record title, the lease is properly held to have terminated.

Stanley I. Okun, Alan L. Schwartzberg, 94 IBLA 197 (Oct. 30, 1986)

Except as provided at 43 CFR 3108.2-1(b) (nominal payment deficiencies), any lease on which there is no well capable of producing oil or gas in paying quantities shall automatically terminate by operation of law if the lessee fails to pay the rental at the proper office on or before the anniversary date of the lease.

Robert & Eileen Taylor, 94 IBLA 259 (Nov. 14, 1986)

BLM properly denies a petition for reinstatement of a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely, filed pursuant to 30 U.S.C. § 188(c) (1982), where the lessee fails to overcome the presumption that BLM never received the rental due either before the lease anniversary date or within 20 days thereafter.

Ben Swartzentruber, Jr., 94 IBLA 344 (Nov. 26, 1986)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

A decision disallowing a pending partial assignment of an oil and gas lease will be affirmed where, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

The provision of 30 U.S.C. § 184(h)(2) (1982), protecting the interests of bona fide purchasers from certain action by the Department to cancel an oil and gas lease is not applicable to expiration of a lease by operation of law under 30 U.S.C. § 226 (1982).

Landmark Exploration Co., 97 IBLA 96 (Apr. 29, 1987)

The Secretary of the Interior may reinstate a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982) if the full rental is paid within 20 days of the lease anniversary date, and the failure to pay timely was justifiable or not due to a lack of reasonable diligence. Under 43 CFR 3108.2-1(a), a remittance postmarked by the U.S. Postal Service on or before the anniversary date and received in the proper office no later than 20 days after such anniversary date is timely filed. However, that regulation does not alter the anniversary date and where the rental payment arrives within that time period, but in an envelope postmarked after the anniversary date, even though the anniversary date fell on a day on which the

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

proper office to receive payment was closed, the lessee did not exercise reasonable diligence.

William R. Barthold, 98 IBLA 293 (July 20, 1987)

Where a tender of payment of the rental for an oil and gas lease more than 5 months before the anniversary date was promptly returned to the lessee with an explanation that it was a duplicate payment for the present lease year and a reminder of the next anniversary date by which rent is due, a decision holding the lease to have terminated by operation of law and denying a petition for reinstatement under 30 U.S.C. § 188(c) (1982) (class I) will be affirmed if the rental payment is not received thereafter until more than 20 days after the anniversary date.

Sue A. Hartman, 99 IBLA 1 (Aug. 11, 1987)

Extension of an oil and gas lease by reason of drilling over the expiration date of the lease requires that drilling operations be ongoing on the expiration date and be conducted in the manner in which someone seriously looking for oil or gas in that area could be expected to proceed. A decision holding a lease to have expired will be affirmed where the well on the lease was abandoned prior to the lease expiration date, notwithstanding the lessee's intent to drill an additional well.

Mobil Producing Texas & New Mexico, Inc., 99 IBLA 5 (Aug. 11, 1987)

Under 30 U.S.C. § 188(c) (1982), BLM lacks authority to make a class I reinstatement of a noncompetitive oil and gas lease terminated automatically for nonpayment of annual rental if the rental payment was not tendered at the proper office within 20 days after the anniversary date.

John P. Lockridge, 101 IBLA 66 (Jan. 27, 1988)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

An oil and gas lease on which there exists a well capable of production in paying quantities on the expiration date of the lease will not expire for lack of production unless the lessee is allowed a reasonable time (at least 60 days) after notice in which to place the well in a producing status.

In order to establish a well capable of producing oil or gas in paying quantities which will extend the term of an oil and gas lease beyond the expiration date, the record must show the existence of a well which is actually in a condition to produce at the time in question. A decision holding a lease to have expired will be affirmed where it is clear from a flow test conducted on the lease expiration date that the well is not capable of production in the absence of reworking operations.

In determining the existence of a well capable of production in paying quantities as of the lease expiration date, the present status of the well is properly distinguished from potential for production. The results of a flow test conducted on the expiration date of the lease will ordinarily be dispositive of the issue. Results obtained in reworking operations conducted after the lease expiration date are not relevant to the status of the well at the critical date.

Amoco Production Co., 101 IBLA 215 (Feb. 26, 1988)

A terminated oil and gas lease may be reinstated pursuant to 30 U.S.C. § 188(c) if the full rental is paid within 20 days after the lease anniversary date, provided failure to pay timely was justifiable and not due to a lack of reasonable diligence. Termination for failure to make timely payment occurs despite possession by BLM, in another lease account, of sufficient money to cover the missed payment. Failure of the lessee to make payment within 20 days of the lease anniversary forecloses reinstatement pursuant to 30 U.S.C. § 188(c), where, prior to termination, the lessee has neither directed BLM to transfer funds to



OIL AND GAS LEASES--ContinuedTERMINATION--Continued

cover payment of the annual rental payment nor indicated that it seeks to use funds from another lease account to pay the annual lease rental.

Energy Research Associates, Inc., 102 IBLA 329 (June 3, 1988)

A petition for reinstatement of a noncompetitive oil and gas lease filed pursuant to sec. 31(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(c) (1982), is properly denied where the payment was mailed to BLM after the anniversary due date and the lessee has not demonstrated that the misplacement of files during a business move or an illness asserted as justification for late payment is the proximate cause of late payment.

Raymond H. Keeve, 103 IBLA 352 (Aug. 10, 1988)

When BLM issues a noncompetitive lease upon an over-the-counter offer, BLM is required to mail a copy of the executed lease to the offeror. A decision that an oil and gas lease has terminated by operation of law for failure to pay timely the annual rental on the first anniversary date will be reversed if BLM did not mail or deliver the lease to the offeror's last address of record.

Carolyn L. Shogrin, 105 IBLA 231 (Nov. 4, 1988)

It is the lessee's responsibility to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating a new lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, the new lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease when the assignor, in tendering annual rental, provides the base lease serial number but fails to identify the new lease by its serial number. BLM properly deems the amount in excess

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

of the payment due on the base lease to be an overpayment on the base lease to be returned to the assignor.

James A. Lynch, Jr., 107 IBLA 253 (Feb. 22, 1989)

Walter T. Clark, Jr., 107 IBLA 257 (Feb. 22, 1989)

It is the responsibility of a lessee to see that any payment tendered for annual rental on an oil and gas lease is so identified that the appropriate State Office can credit that payment to the proper lease account. When both the official assignment creating the lease and the notice informing the assignee that the assignment has been approved contains the correct serial number, but the lessee includes an incorrect serial number on his payment check, he has not adequately identified his payment, and the lease terminates by operation of law for failure to pay rental on or before the anniversary date of the lease.

Under 30 U.S.C. § 188(c)(1982), BLM has no authority to reinstate a noncompetitive oil and gas lease terminated by operation of law for failure to pay annual rental timely unless the full amount of the rental due is submitted within 20 days after the anniversary date and other requirements are met.

Kiyoshi Matsuno, 107 IBLA 261 (Feb. 22, 1989)

A rental payment for an oil and gas lease sent to the wrong office does not constitute proper tender of rental. BLM is required to terminate an oil and gas lease for failure to pay rental timely, and properly looks to the lessee of record for such payment. The assignee of an oil and gas lease, however, may tender payment while approval of the assignment is pending.

Henry Y. Yoshino, 108 IBLA 47 (Mar. 21, 1989)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence. The complexity of the lessee's business affairs will not justify a late payment.

Clarence Souser, 108 IBLA 59 (Mar. 22, 1989)

An oil and gas lease which is in its extended term by reason of production terminates by operation of law when it is determined that the lease no longer has a well capable of production in paying quantities and no approved reworking or drilling operations are commenced within 60 days of cessation of production.

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililand 108 IBLA 144 (Apr. 5, 1989)

BLM may, in accordance with 43 CFR 3108.2-3(f), reduce the royalty rate for a reinstated lease in three separate circumstances: (1) where it finds undue hardship or premature termination of production would result; (2) where a lessee has expended funds to develop the lease, after the rental was due and not paid, on the basis of any written action of the United States, its agents or employees, which preceded the expenditure of those funds and was a major consideration in their expenditure; or (3) where it finds it is equitable to do so for any other reason.

Where an oil and gas lessee requests, in accordance with 30 U.S.C. § 188(i)(2) (1982), and 43 CFR 3108.2-3(f), reduction of the increased royalty rate upon reinstatement of its lease on the basis that a

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

written action by BLM preceded and was a major consideration in its expenditure of funds to develop the lands covered by the lease after the rental became due and was not paid, that request is properly denied when the record shows that although the lessee received a letter from BLM after the anniversary date of the lease, that letter did not precede and was not a major consideration in the lessee's expenditure of funds to develop the lands covered by the lease.

Mallon Oil Co., et al., 108 IBLA 241 (Apr. 24, 1989)

Reinstatement of a terminated oil and gas lease pursuant to 30 U.S.C. § 188(c) (1982), requires a showing by the lessee that the late rental payment was either justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the due date is not reasonable diligence.

Nyle Edwards, 109 IBLA 72 (May 30, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, and the lease has no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

Under procedures for class I reinstatement, 30 U.S.C. § 188(c) (1982), failure to exercise reasonable diligence in paying the rental for an oil and gas lease may be considered justifiable if it is demonstrated that, at or near the anniversary date, there existed sufficiently extenuating circumstances outside of the lessee's control which affected her actions in failing to make timely payment. Mere negligence, forgetfulness, and inadvertence of the lessee in

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

effecting rental timely are not sufficient to warrant class I reinstatement.

Nancy Houston, 109 IBLA 79 (May 31, 1989)

Pursuant to 30 U.S.C. § 183(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment after the lease anniversary date does not constitute reasonable diligence.

George Foster, 109 IBLA 82 (May 31, 1989)

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of the lease, on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the date it is due will not establish reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day the office is open) as required by the regulation at 43 CFR 3108.2-2(a), 53 FR 17357 (May 16, 1988).

Seth & Alice Swift, 109 IBLA 270 (June 16, 1989)

OIL AND GAS LEASES--ContinuedTERMINATION--Continued

Approval of an assignment of record title interest to a portion of the lands embraced in an oil and gas lease has the effect of segregating the assigned tract into a separate lease effective on the first day of the month following the filing of all necessary documents in the proper BLM office. Although the termination of the parent lease for failure to pay the annual rental by the anniversary date, subsequent to the filing of the assignment, will not preclude approval of the assignment where the annual rental for the assigned tract has been timely tendered, a decision denying approval of the assignment will be affirmed where the parent lease has terminated for failure to pay the annual rental and the assignee has not continued to tender the annual rental for the assigned tract.

Gary L. Baird, 111 IBLA 280 (Oct. 26, 1989)

UNIT AND COOPERATIVE AGREEMENTS

In determining whether or not a unit well is capable of producing unitized substances in paying quantities a "preponderance of the evidence" standard of proof must be employed. In determining whether or not one has met the applicable standard of proof, this Board will consider the actual standard applied rather than the phrase employed by the factfinder to describe it.

This Board may rely on reports of Departmental technical experts in determining whether or not a unit well is capable of producing unitized substances in paying quantities. A determination by Departmental technical experts will not be set aside where it is not arbitrary or capricious, and is supported by competent evidence.

The Bureau of Land Management practice of deducting overriding royalties from gross revenue in making "paying quantities" determinations is the accepted trade practice, custom, and usage. Where a well-established practice or custom is shown to exist, it is assumed that the parties to a contract intended that practice or custom to apply in the absence of express language in the contract to the contrary.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)



## OIL AND GAS LEASES--Continued

### UNIT AND COOPERATIVE AGREEMENTS--Continued

Sec. 25 of the standard form unit agreement, 43 CFR 3186.1, only relieves the unit operator from compliance with unit drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the unit operator must still obtain a sec. 39 suspension, and must comply with the requirements of sec. 39, in order to prevent leases from expiring while he is excused from unit requirements.

Oil & Gas Lease Suspension, M-36953 (May 31, 1985)  
92 I.D. 293

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the land in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for so long as committed, provided that production is obtained within the unit prior to expiration of the term of the lease.

American Resource Management Corp. (On Judicial Remand),  
88 IBLA 172 (Aug. 20, 1985)

Where the record establishes that a party holding the entire working interest in a tract has committed that interest to a unit agreement which has been subsequently approved in the public interest, but the tract was found not to be committed on the erroneous belief that less than the entire working interest was committed, a decision holding an oil and gas well on the tract not to be a unit well will be reversed.

Nucorp Energy, Inc., 88 IBLA 195 (Aug. 21, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290

## OIL AND GAS LEASES--Continued

### UNIT AND COOPERATIVE AGREEMENTS--Continued

of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

Where a producing unit agreement terminates after the conclusion of the primary term of the parent lease and part of the lands in the parent lease are simultaneously committed to a second producing unit, thereby effecting a segregation of the parent lease, the term of the nonunitized lease without production shall be for so long as oil or gas is produced in paying quantities upon the unitized lease, but not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

Conoco, Inc., 90 IBLA 388 (Feb. 28, 1986)

Wexpro Co., 90 IBLA 394 (Feb. 28, 1986)

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from a straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative

OIL AND GAS LEASES--ContinuedUNIT AND COOPERATIVE AGREEMENTS--Continued

period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)  
93 I.D. 95

Unit agreements involving Federal oil and gas interests are effective as to those interests only upon the approval of the authorized officer. When a Federal lease in its extended term completes the term prior to approval of a unit agreement, that lease is not subject to extension under 43 CFR 3107.3-1 upon the subsequent approval of the unit agreement.

Lario Oil & Gas Co., 92 IBLA 46 (May 9, 1986)

Where an oil and gas lease is in its extended term by reason of production at the time the lease is segregated by commitment in part to a unit agreement in accordance with 30 U.S.C. § 226(j) (1982), the segregated nonunitized lease will continue in effect by virtue of that production, but for not less than 2 years from the date of segregation.

Anadarko Production Co., 92 IBLA 212 (June 16, 1986)  
93 I.D. 246

OIL AND GAS LEASES--ContinuedUNIT AND COOPERATIVE AGREEMENTS--Continued

Before issuance of a competitive oil and gas lease for land within the area of an approved unit agreement, it is proper to require the successful bidder to file evidence that it has entered into an agreement with the unit operator for development of the land in the lease under the terms and provisions of the approved unit agreement or to file a statement giving satisfactory reasons for failure to enter such agreement.

Where a high bidder for a competitive oil and gas lease within the area of an approved unit agreement fails to file evidence showing joinder to the unit agreement or to submit satisfactory reasons for failure to enter into agreement with the unit operator, it is proper to reject the bid and to refund the balance of the bonus bid and the first year's rental. However, where the bidder explains on appeal that it did make inquiry regarding joinder to the unit but received no response, and there are no intervening rights, the case may be remanded to BLM to allow the bidder additional time to submit proof of joinder.

Rodeo Oil Co., 93 IBLA 131 (July 29, 1986)

Although the statutory language in secs. 17(e) and 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), regarding the extension of leases by reason of production is not identical, a single standard applies. Mere discovery of oil or gas in paying quantities is insufficient to extend a lease subject to a unit agreement.

Hiko Bell Mining & Oil Co., et al., 93 IBLA 143 (July 30, 1986)

Where BLM approves a revision to a participating area under a unit agreement based on a determination that a unit well is capable of producing unitized substances in quantities sufficient to repay the costs of drilling, completing, and producing the well with a reasonable profit, the decision will be affirmed on appeal unless the appellant establishes by a preponderance of the evidence the well is not a paying well.

Monsanto Oil Co., et al., 95 IBLA 112 (Jan. 6, 1987)



# OIL AND GAS LEASES--Continued

## UNIT AND COOPERATIVE AGREEMENTS--Continued

Where a lease committed in part to a unit agreement is extended by reason of production at the time of commitment, the segregated nonunitized lease is extended for the life of such production but not less than 2 years from the date of segregation pursuant to sec. 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1982).

Anadarko Production Co., 96 IBLA 320 (Apr. 7, 1987) 94 I.D. 129

Where an oil and gas lease in its primary term is partially committed to a unit agreement, the term of the nonunitized lease created by segregation is the remainder of the primary term of the parent lease but not less than 2 years from the date of segregation.

Raymond T. Duncan et al., 96 IBLA 352 (Apr. 8, 1987)

Departmental regulations at 43 CFR Part 3160 governing onshore oil and gas operations apply to facilities located on private leases which participate with Federal and/or Indian leases under a unit agreement approved by the Department's authorized officer. Accordingly, a unit operator is required to submit site facility diagrams of facilities located on such private leases under 43 CFR 3162.7-4(d)(1) to aid BLM in accounting for production and royalties allocated to the Federal and/or Indian leases.

Tricentrol United States, Inc., 97 IBLA 387 (May 27, 1987)

Under 30 U.S.C. § 226(j) (1982), the Department is without authority to create separate leases out of a single lease upon its partial elimination from a unit plan by contraction of the unit area. Thus, partial elimination of a lease has no effect on its tenure.

Under 30 U.S.C. § 226(j) (1982), any lease partially committed to a unit plan shall be segregated into separate leases as to the lands committed and the lands not committed. Thereafter, they are distinct leases, and are administered independently of each

# OIL AND GAS LEASES--Continued

## UNIT AND COOPERATIVE AGREEMENTS--Continued

other. The statute does not give the segregated nonunitized portion of a lease a new term, but provides that the lease shall continue in force and effect for the term thereof, but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The word "term" here refers to the entire term of the lease, i.e., the period the lease has to run, whether that period were definite or indefinite, as it existed on the date of segregation.

When a lease is segregated upon partial commitment to a unit agreement pursuant to 30 U.S.C. § 226(j) (1982), production on one segregated lease can extend the term of the other segregated lease only if the segregation occurs when the base lease is in an extended term because of production and not in a fixed term of years.

Under 30 U.S.C. § 226(j) (1982), any lease which shall be eliminated from any approved unit plan and any lease which shall be in effect at the termination of such a plan shall continue in effect for the original term thereof, but for not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. This provision is mandatory and leaves no room for the exercise of discretion. It applies to any lease eliminated from a unit plan without exception.

If a lease is no longer in its original term, but is held by production at the time of its elimination from a unit, it continues under 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

The legislative history of the provision of the Mineral Leasing Act covering unitization of Federal leases, 30 U.S.C. § 226(j) (1982), contains clear and specific evidence of legislative intent that the provisions concerning elimination of leases from units and segregation of leases were intended to benefit lessees by encouraging the separate development of nonunitized lands. These provisions were not intended to allow such land to be held by production from other leases.

Celsius Energy Co., Southland Royalty Co., 99 IBLA 53 (Sept. 8, 1987) 94 I.D. 394



OIL AND GAS LEASES--ContinuedUNIT AND COOPERATIVE AGREEMENTS--Continued

Where unit termination coincides with the conclusion of the primary term of a producing lease committed to said unit, the lease is extended by 30 U.S.C. § 226(j) (1982) for a fixed term of 2 years and is not regarded as held by production during this 2-year period.

Pennzoil Co., 99 IBLA 245 (Oct. 20, 1987)

The participating area established pursuant to a unit agreement may be revised to include additional lands then regarded as reasonably proved productive of unitized substances in paying quantities, or which are necessary for unit operations. Lands utilized for water injection wells may be added to the participating area if those wells improve recovery of unitized substances in the participating area, since those lands may be considered necessary for unit operations. However, where lands are added to a participating area on the basis that they are necessary for unit operations, the record on appeal must show a rational basis for that determination. Where it does not, the BLM decision to include certain lands will be set aside.

Champlin Petroleum Co., 100 IBLA 157 (Dec. 3, 1987)

Even when the doctrine of commercial impracticability is applicable, it may be invoked only where a party first establishes the factual basis for doing so. Therefore, where a unit operator fails to establish the necessary facts, the Board will decline to determine whether or not, in the proper circumstances, commercial impracticability could serve to waive diligent drilling requirements as set forth in a unit agreement.

Koch Exploration Co., 100 IBLA 352 (Jan. 12, 1988)

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery,"

OIL AND GAS LEASES--ContinuedUNIT AND COOPERATIVE AGREEMENTS--Continued

and enacted a separate provision for the tenure of a lease on which there was no actual production but only a well capable of production.

Under 30 U.S.C. § 226(f) and (j) (1982), a unitized oil and gas lease will not expire for lack of production at the end of its term if there is a unit well capable of producing oil or gas in paying quantities. Such a well must be in physical condition to produce and is not in such condition if the casing has not been perforated.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

Where an offeror for a noncompetitive oil and gas lease for acquired lands within an approved unit agreement fails to submit, within a specified time period established by BLM, evidence either that the offeror has entered into the agreement, or that the unit operator does not object to lease issuance without unit joinder in accordance with 43 CFR 3101.3-1, or to request an extension of time for compliance, and where there are intervening rights, BLM may properly reject the offer.

Mary Nan Spear, 101 IBLA 13 (Jan. 22, 1988)

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

# OIL AND GAS LEASES--Continued

## UNIT AND COOPERATIVE AGREEMENTS--Continued

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

Petro-Lewis Corp., 108 IBLA 20 (Mar. 20, 1989) 96 I.D. 127

A unit agreement may not be unilaterally reformed by BLM to include land which has not been committed to the unit agreement.

Where an unleased tract has been determined to be within a participating area pursuant to an approved unitization plan, revenues attributable to the tract held in escrow pursuant to the plan may not be used by BLM to secure a favorable bargain under competitive leasing requirements.

Lands not committed to a unit agreement may not participate in any production from unitized lands.

Unleased Federal lands determined to be productive in paying quantities as part of a unitization plan may not be considered "unitized" to protect the uncommitted land from drainage.

Once a unit operating agreement has become effective BLM lacks authority to amend the agreement without the parties' consent.

Coors Energy Co., 110 IBLA 250 (Sept. 11, 1989)

# OIL AND GAS LEASES--Continued

## UNIT AND COOPERATIVE AGREEMENTS--Continued

The automatic termination provisions of 30 U.S.C. § 188 (1982), do not apply to an oil and gas lease which has been committed to a unit, where there is production from a unit well anywhere in the unit.

Walter S. Fees, Jr., 110 IBLA 377 (Sept. 19, 1989)

A party is not required to appeal from a BLM letter which does not adversely affect it, is informative in nature, and does not set forth appeal rights.

For onshore operations, the congressional grant of authority, found at 30 U.S.C. § 226(j) (1982), authorizes the Secretary to order the combining of units and participating areas for conservation reasons. Included in this grant is the authority to approve any unit plan he may deem necessary or proper to secure the proper protection of the public interest, to mandate unitization, and to prescribe a plan which shall adequately protect the rights of all parties in interest, including the United States, and this authority may be exercised over the objections of working and royalty interest owners affected by that action. Having the authority to create, expand, or contract units and participating areas, the Secretary also has the concomitant authority to order such joinder as is necessary to implement that decision.

Under 30 U.S.C. § 226(j) (1982), as a condition precedent to establishing, expanding, or contracting a unit, the "reasonableness" of the proposal must be considered by the Department.

A unit operating agreement is a private contract document between one or more working interest owners and the unit operator providing for payment and allocation of costs and expenses incurred by the unit operator when conducting unit operations. Once a unit operating agreement has become effective, BLM lacks the authority to amend the agreement without the parties' consent.

Chevron U.S.A. Inc., 111 IBLA 96 (Sept. 28, 1989)

OIL AND GAS LEASES--ContinuedWELL CAPABLE OF PRODUCTION

Where BLM approves a revision to a participating area under a unit agreement based on a determination that a unit well is capable of producing unitized substances in quantities sufficient to repay the costs of drilling, completing, and producing the well with a reasonable profit, the decision will be affirmed on appeal unless the appellant establishes by a preponderance of the evidence the well is not a paying well.

Monsanto Oil Co., et al., 95 IBLA 112 (Jan. 6, 1987)

BLM may properly require the operator of a communitized area to conduct a 60-day test of a well pursuant to 43 CFR 3162.4-2(b), where the communitization agreement and the leases thereunder are each held in an extended term and the well at issue has been shut in for 2 years.

Byron Oil Industries, Inc., 100 IBLA 84 (Nov. 30, 1987)

An oil and gas lease on which there exists a well capable of production in paying quantities on the expiration date of the lease will not expire for lack of production unless the lessee is allowed a reasonable time (at least 60 days) after notice in which to place the well in a producing status.

In order to establish a well capable of producing oil or gas in paying quantities which will extend the term of an oil and gas lease beyond the expiration date, the record must show the existence of a well which is actually in a condition to produce at the time in question. A decision holding a lease to have expired will be affirmed where it is clear from a flow test conducted on the lease expiration date that the well is not capable of production in the absence of reworking operations.

In determining the existence of a well capable of production in paying quantities as of the lease expiration date, the present status of the well is properly distinguished from potential for production. The results of a flow test conducted on the expiration date of the lease will ordinarily be dispositive of the issue. Results obtained in reworking operations conducted after the lease expiration date are not

OIL AND GAS LEASES--ContinuedWELL CAPABLE OF PRODUCTION--Continued

relevant to the status of the well at the critical date.

Amoco Production Co., 101 IBLA 215 (Feb. 26, 1988)

An oil and gas lease which is in its extended term by reason of production terminates by operation of law when it is determined that the lease no longer has a well capable of production in paying quantities and no approved reworking or drilling operations are commenced within 60 days of cessation of production.

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gililand, 108 IBLA 144 (Apr. 5, 1989)

OIL SHALEWITHDRAWALS

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

OMB CIRCULAR A-76

An appeal arising out of a cost comparison by the National Park Service under OMB Circular A-76 is dismissed as moot where a newly enacted statute prohibits the National Park Service from awarding any contracts pursuant to the Circular absent specific



OMB CIRCULAR A-76--Continued

appropriations therefor, and no specific appropriations are provided for the purpose of the contract.

Appeal of B&W Service Industries, Inc., IBCA-1859  
(A-76) (Jan. 2, 1985) 92 I.D. 36

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

GENERALLY

"Political subdivision." Although a provision of the Recreational and Public Purposes Act, 43 U.S.C. § 869-1(d) (1982), authorizes issuance of leases for public land to nonprofit corporations, this authority does not extend to nonprofit corporations, this authority railroad grant lands which may be leased only to states and counties, state and Federal instrumentalities and political subdivisions, and municipal corporations. A nonprofit corporation which is not a "political subdivision" within the meaning of the Act, is not eligible for such a lease.

Upper Mohawk Community Council, 104 IBLA 389 (Oct. 3, 1988)

LEASES

"Political subdivision." Although a provision of the Recreational and Public Purposes Act, 43 U.S.C. § 869-1(d) (1982), authorizes issuance of leases for public land to nonprofit corporations, this authority does not extend to nonprofit corporations, this authority railroad grant lands which may be leased only to states and counties, state and Federal instrumentalities and political subdivisions, and municipal corporations. A nonprofit corporation which is not a "political subdivision" within the meaning of the Act, is not eligible for such a lease.

Upper Mohawk Community Council, 104 IBLA 389 (Oct. 3, 1988)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS--Continued

NONMINERAL ENTRIES AND DISPOSALS

"Political subdivision." Although a provision of the Recreational and Public Purposes Act, 43 U.S.C. § 869-1(d) (1982), authorizes issuance of leases for public land to nonprofit corporations, this authority does not extend to nonprofit corporations, this authority railroad grant lands which may be leased only to states and counties, state and Federal instrumentalities and political subdivisions, and municipal corporations. A nonprofit corporation which is not a "political subdivision" within the meaning of the Act, is not eligible for such a lease.

Upper Mohawk Community Council, 104 IBLA 389 (Oct. 3, 1988)

TIMBER SALES

Where, subsequent to the issuance of a final programmatic EIS detailing a specific level of clearing activities, it is determined to substantially increase the amount of acreage to be clearcut, far beyond any level reasonably foreseeable by a review of the EIS, BLM must either issue a new EIS or a supplemental EIS prior to implementing the increased level of clearcutting.

A party seeking to establish that BLM has violated applicable policies regarding clearcutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

Sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a-1181f (1982) requires that reverted Oregon and California Railroad lands classified as timberlands shall be managed (with one exception) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS  
BAY GRANT LANDS--Continued

TIMBER SALES--Continued

Authority for BLM's clearcut harvest of low-intensity lands, whose timber forms no part of allowable cut, is found in sec. 307(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(a) (1982), wherein the Secretary is authorized to conduct investigations, studies, and experiments on his own initiative or in cooperation with others involving the management, protection, development, acquisition, and conveying of public lands.

In re Upper Floras Timber Sale et al., 86 IBLA 296  
(May 13, 1985)

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tiered to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Humpy Mountain Timber Sale, 88 IBLA 7 (June 28,  
1985)

The Board will affirm a decision to proceed with a proposed timber sale when the record indicates that BLM adequately considered all relevant factors and appellant has failed to meet its burden of showing error in BLM's decision.

In re Letz Boogie Timber Sale, 102 IBLA 137 (Apr. 25,  
1988)

Under 43 U.S.C. § 1181a (1982), reverted Oregon and California Railroad Grant land which is classified as timber land must be managed under sustained yield principles for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, contributing to the economic

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS  
BAY GRANT LANDS--Continued

TIMBER SALES--Continued

stability of local communities and industries, and providing recreational facilities.

Upper Mohawk Community Council, Oregon Natural  
Resources Council, 104 IBLA 382 (Oct. 3, 1988)

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

In re Crane Prairie Timber Sale, 109 IBLA 188 (June 12,  
1989)

OUTER CONTINENTAL SHELF LANDS ACT

(See also Oil & Gas Leases--If included in this Index.)

GENERALLY

The statutory definition of "Outer Continental Shelf" applies to submerged lands seaward of those granted to the States in the Submerged Lands Act.

The statutory definition of "Outer Continental Shelf" includes all submerged lands which the United States currently claims under international law as being subject to its jurisdiction and control.

Generally, because the United States currently claims Continental Shelf jurisdiction to a minimum of 200 nautical miles from its coasts, the Secretary has the authority to issue mineral leases covering areas within 200 miles of the coasts of the 50 States.

Authority to Issue Outer Continental Shelf Mineral  
Leases in the Gorda Ridge Area, M-36952 (May 30,  
1985) §2 I.D. 459

OUTER CONTINENTAL SHELF LANDS ACT--Continued

GENERALLY--Continued

The Department may begin presale procedures for a lease sale before the approval of the 5-year schedule on which it is listed.

Whether the Department May Issue a Call for Information & Nominations for Outer Continental Shelf Lease Sale  
91, M-36954 (Feb. 10, 1986) 93 I.D. 125

If the terms of a Federal-State cooperative agreement entered into pursuant to 43 U.S.C. § 1352 (1982), provide that an oil and gas lease issued by the Federal Government is to be issued and administered pursuant to Federal laws, Federal laws and regulations pertaining to release of confidential information will apply. If a decision to release such information comports with Federal law the release of the information is not a breach of discretionary authority.

Shell Western Exploration & Production, Inc., 96 IBLA 244 (Mar. 24, 1987)

Civil penalties and late payment interest assessed against Outer Continental Shelf lessees are not "bonuses, rents, . . . royalties, or other revenues (derived from any bidding system . . .)" within the meaning of 43 U.S.C. § 1337(g)(2). Therefore, they may not be shared with coastal states and must be deposited in miscellaneous receipts in the Treasury.

For royalty revenues from leases subject to 43 U.S.C. § 1337(g), the provisions of sec. 1337(g)(2) and (4) on investing and disbursing funds to coastal states supersede the provisions of 30 U.S.C. § 1721(b).

Under 43 U.S.C. § 1337(g)(2), the Department is not required to invest a state's share of revenues. It may instead disburse them to the state as soon as they have been transferred from the Treasury's general suspense account to the special account created by sec. 1337(g)(2).

Under 43 U.S.C. § 1337(g)(2), the Department has no authority to pay interest to a coastal state on

OUTER CONTINENTAL SHELF LANDS ACT--Continued

GENERALLY--Continued

revenues held in the suspense account pending resolution of errors and disputes.

Issues Regarding Late Payment Interest & Civil Penalties Related to Offshore Oil & Gas Leases Governed by § 8(g) of the Outer Continental Shelf Lands Act, M-36956 (Jan. 14, 1988) 95 I.D. 203

An application for suspension of an Outer Continental Shelf oil and gas lease made pursuant to Minerals Management Service Release No. 86-12 will properly be denied if the party seeking the suspension is not the designated operator and the application has not been filed by all lessees. Suspensions pursuant to that release were to be granted only upon a showing of both an inability to obtain the necessary NPDES permits during the period between June 30, 1984, and July 2, 1986, and a showing that the delay in exploration activities was a result of this inability. The application required that the applicant attest to this fact, and absent a joint attestation by all lessees, the only party able to attest to these facts is the operator.

Chevron U.S.A., Inc., 103 IBLA 296 (Aug. 3, 1988)

Where there are divergent views of state officials concerning the interpretation of a provision of a lease maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), the Board will interpret the provision in accordance with general rules for construing contracts. When a royalty clause provides the lessee pay "sums equal to the value of gas produced and saved or utilized at the well, provided no gathering or other charges are made chargeable to lessor," the lessee may not deduct the cost of compressor fuel from royalties paid for gas used or flared on a sec. 6 lease.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES

Where the lessee under an outer continental shelf oil and gas lease diverts gas produced under the lease from buyer A to buyer B in order to fulfill a warranty contract and computes royalty on the basis of the contract price to B, the Minerals Management Service may properly recompute the royalty based on the contract price to A where the price that would have been paid by buyer A represents the reasonable unit value of production under 30 CFR 250.64 (1982), i.e., the highest price which could be received for the gas at the time of production, despite prior approval of use of the warranty contract price for calculation of royalties for gas produced under other leases.

Amoco Production Co., 85 IBLA 121 (Feb. 15, 1985)

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from a straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

The Minerals Management Service (MMS) is authorized to issue royalty value determination letters, which will be binding on the Department and the lessee unless and until rescinded or modified by MMS. A royalty value determination letter properly issued by MMS cannot be interpreted in a manner which would result in the delegation of authority for determination of royalty amounts to a lessee. Such a letter must establish the basis for determination in sufficiently specific language to permit the exact basis for determination, and cannot bind the Department to a royalty rate merely because that rate has been approved by the Federal Power Commission.

Amoco Production Co. (On Reconsideration), 94 IBLA 129 (Oct. 9, 1986)

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to buyer A and enters into a transportation agreement with buyer A to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to buyer A as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to buyer A and not

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

warranty contract prices for sale of gas to other buyers.

Amoco Production Co., 96 IBLA 347 (Apr. 8, 1987)

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)  
94 I.D. 329

The Minerals Management Service correctly concluded that 30 CFR 202.150(a) precludes the deduction of line losses attributed to the transportation of royalty oil from the wellhead of an Outer Continental Shelf oil and gas lease to an onshore delivery point, as a transportation allowance.

Conoco, Inc., 103 IBLA 108 (July 19, 1988)

An application for suspension of an Outer Continental Shelf oil and gas lease made pursuant to Minerals Management Service Release No. 86-12 will properly be denied if the party seeking the suspension is not the designated operator and the application has not been filed by all lessees. Suspensions pursuant to that release were to be granted only upon a showing of both an inability to obtain the necessary NPDES permits during the period between June 30, 1984, and July 2, 1986, and a showing that the delay in exploration activities was a result of this inability. The application required that the applicant attest to this fact, and absent a joint attestation by all lessees, the only party able to attest to these facts is the operator.

Chevron U.S.A., Inc., 103 IBLA 296 (Aug. 3, 1988)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

The United States, as lessor of an oil and gas lease, is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary. Where a party challenges a determination as to the value of gas produced, the party must establish that the methodology used in the Government's computation is, in fact, erroneous.

30 CFR 218.54(a) authorizes the Minerals Management Service to impose a late payment interest charge where royalty payments for offshore oil and gas leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the United States for loss of use of funds which it is due under an express royalty computation and payment program.

Sun Exploration & Production Co., 104 IBLA 178 (Sept. 9, 1988)

The Department is not bound by 30 CFR 250.64 (1979), to value production for royalty purposes according to the contract price. However, when a lessee computes royalty for gas sold under a contract according to the contract price and the Government accepts that valuation, yet rejects that same valuation for unregulated gas transferred to the lessee's refinery under a firm transportation agreement with the contract buyer, such a rejection is improper where the facts show that, in the absence of being transferred to lessee's refinery, such gas would have been required to have been sold to the same buyer according to the same contract price accepted by the Government.

Texaco, Inc., 104 IBLA 304 (Sept. 15, 1988)

MMS does not abuse its discretion in failing to waive payment of interest charges for late payments of royalties where a Notice to Lessees concerning those payments is not so confusing as to make imposition of the charges inequitable.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

Where the lessee under an Outer Continental Shelf oil and gas lease commits 10 percent of its gas production from the lease to a buyer and enters into a transportation agreement with that buyer to transport the uncommitted production to other buyers, the value of a "transportation allowance" (a percentage of the natural gas being delivered to the buyer as compensation for transportation service) will be calculated on the basis of a value determination letter pertaining to the sale of 10 percent of the production to the buyer, and not on the basis of warranty contract prices for sale of gas to other buyers.

Value for royalty purposes is determined independently of the price at which the commodity was sold. Under 30 CFR 250.64 (1981), 30 CFR 206.150 (1987), the value of production for royalty purposes may not be less than the fair market value.

Amoco Production Co., 108 IBLA 358 (May 15, 1989)

In the absence of a market for oil at the wellhead where production would ordinarily be sold and valued, the deduction of a transportation allowance from the value of the oil at the nearest available market has been allowed. Although the point of first "sale" of oil is generally an indicia of the existence of a market, the substance of a transportation will prevail over form and a decision rejecting a transportation allowance for oil "sold" to a pipeline will be set aside where it appears from the record that the oil was held for the account of the lessee, the lessee received no consideration for "sale" of the oil, the oil was redelivered to the lessee at the end of the pipeline, and the only consideration paid was a \$2.50-per-barrel service charge to the pipeline.

ARCO Oil & Gas Co., 109 IBLA 34 (May 25, 1989)

Under the regulations then in effect, a transportation allowance formula issued by Minerals Management Service fixing the rate of return on undepreciated investment to be included in the formula is not subject

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

to the notice and comment provisions of 5 U.S.C. § 553(b) (1982).

Under the regulations in effect at the time that the transportation allowance formula was adopted, the Secretary of the Interior had discretionary authority to determine the factors to be considered when computing transportation allowances for royalty valuation purposes. When it is shown that the Minerals Management Service applied a formula which had been developed after appropriate research and consultation with affected oil companies and the appellant does not provide convincing evidence that a 8-percent rate of return on the undepreciated investment used in the formula was unreasonable, the transportation allowance will be upheld.

Conoco, Inc., 109 IBLA 89 (May 31, 1989)

Under 30 CFR 250.64, the value of production of crude oil produced from a lease issued under the Outer Continental Shelf Lands Act for the purposes of computing royalties may not be less than "gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly determined that "gross proceeds" includes "tertiary incentive revenue" under 10 CFR 212.78 (1980).

Pennzoil Oil & Gas, Inc., 109 IBLA 147 (June 8, 1989)

Sec. 308 of FOGRMA, 30 U.S.C. § 1756 (1982), requiring payment of royalties on oil or gas lost or wasted from a lease site, is applicable to gas vented and flared as a result of a 1985 well blowout on a lease issued prior to enactment of FOGRMA on the Outer Continental Shelf.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)



OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

The valuation of natural gas liquid products for purposes of computing the royalty due is required by statute and regulation to be not less than the greater of the fair market value or the gross proceeds realized by the lessee. One of the factors to be considered in assessing fair market value under the regulation governing royalty valuation is posted prices. A determination of fair market value based on posted spot market prices will be sustained as consistent with the regulation in the absence of a showing that this is inconsistent with fair market value.

A policy guideline interpreting the royalty valuation regulation as it applies to natural gas liquid products is properly distinguished from a regulation having the force and effect of law promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act. Although such a policy guideline is not binding on the Board and will not be followed where it is inconsistent with the relevant regulation, it will be upheld by the Board on appeal where it provides a reasonable basis for a decision applying the royalty valuation regulation and is consistent therewith.

In the absence of acceptance of the lessee's royalty valuation as conclusive by an official authorized to bind the Department on this matter, the Department is not barred from rejecting the valuation, valuing production by another acceptable method, and demanding payment of royalty based on this method.

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Conoco Inc., ARCO Oil & Gas Co., 110 IBLA 232  
(Aug. 29, 1989)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

The procedures set forth at 30 CFR 250.70 - 250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Where MMS issues an order requiring the submission of additional past royalties and thereafter denies a request from the lessee that it be permitted to post a bond in lieu of tendering the money during the pendency of an appeal, the failure of the lessee to appeal from the decision of MMS denying the request to post a bond and the subsequent tender of the amount demanded constitutes a waiver of any objection to the requirement that the money be tendered during the pendency of the appeal.

Where the appropriate Oil and Gas Supervisor issues a letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, and that gas is subsequently decontrolled, the letter ceases to be a valid basis for the computation of the amount of royalty due to the United States.

As a general rule, "reasonable value" for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is higher.

Where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of the production from the lease, though claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Where, however, for no justifiable reason, a lessee fails to timely invoke a clause permitting renegotiation of the price received with the result that royalties continue to be based on a lower price, the lessee is properly required to tender additional royalties based on the prices received by other lessees who timely invoked similar renegotiation provisions.

Where a Federal oil and gas lessee voluntarily agrees to reduction in the price paid for oil or gas by an affiliated purchaser, and the evidence establishes that, but for the affiliated relationship between the lessee and the purchaser, a higher price

OUTER CONTINENTAL SHELF LANDS ACT--ContinuedOIL AND GAS LEASES--Continued

would have been obtained for the production, the lessee is properly deemed to have breached its duty of fair dealing with the lessor and royalty is properly computed based on the prices received by other lessees who had similar contractual arrangements with the producer but who refused to assent to lower payments for their production from the same lease.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

For the purpose of computing royalties under 30 CFR 206.150 (1987), the value of gas produced from leases issued under the Outer Continental Shelf Lands Act may not be less than "the gross proceeds accruing to the lessee from the disposition of the produced substances." MMS properly refuses to allow a lessee to deduct the lessee's costs of hiring a third party "marketer" (to find buyers, negotiate sales contracts, and monitor the sales of the produced gas) from gross proceeds.

Walter Oil & Gas Corp., 111 IBLA 260 (Oct. 25, 1989)

Where a Federal oil and gas lessee paid royalty on the value of production which was less than "gross proceeds accruing to the lessee from the disposition of the produced substances," an underpayment of royalty was made in violation of 30 CFR 206.150 (1987). Although the underpayment was erroneously authorized to be made, the Department was not estopped from correcting its error and collecting the correct payment.

Shell Offshore Inc., 111 IBLA 350 (Nov. 2, 1989)

Where a floor price was established generally for natural gas liquid product valuation for royalty calculation, royalty could not be assessed using a higher rate than the floor price.

OUTER CONTINENTAL SHELF LANDS ACT--ContinuedOIL AND GAS LEASES--Continued

Where royalty payments made by an oil and gas lessee were based on values lower than values for actual sales of the products in question, assessment for underpaid royalty was properly made.

It was premature to assess late payment charges while the principal amount of royalty owed by a lessee remained to be determined on appeal and where the requirement to pay pending appeal was stayed until final decision concerning the principal amount owed could be issued.

Union Oil Co. Union Exploration Partners, Ltd., 111 IBLA 369 (Nov. 7, 1989)

The existence of changed market conditions is insufficient to alter the scope of a Federal lessee's duty to market gas. Where a lessee contracts with a marketing agent to find buyers for unprocessed gas production off the lease, lessee is not entitled to an allowance for this marketing cost, as such costs necessarily are incurred in the lessee's duty to prudently market production, regardless of where the market is located.

Arco Oil & Gas Co., 112 IBLA 8 (Nov. 9, 1989)

In valuing, for royalty computation purposes, natural gas liquid products processed and sold under non-arm's-length contracts in Louisiana, MMS may properly compare the prices reported by the lessee to published spot market prices for similar products in Texas where the lessee fails to establish that its prices are reflective of fair market value received under arms's-length contracts. However, where the reported prices fall below the lowest spot market price constituting the fair market value floor, MMS may not value production according to an average spot market price.

Mobil Oil Corp., 112 IBLA 56 (Nov. 21, 1989)



# OUTER CONTINENTAL SHELF LANDS ACT--Continued

## OIL AND GAS LEASES--Continued

The Procedure Paper on Natural Gas Liquid Products Valuation, developed by MMS, is not a regulation subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b) (1982).

In accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, MMS will normally accept a non-arm's-length contract price for royalty purposes where the lessee can show that the non-arm's-length contract has characteristics similar to arm's-length contracts which represent fair market value. The fact that third party contracts include a deduction for marketing costs does not discredit the arm's-length nature of those contracts or establish that the price is not fair market value. Nevertheless, where that price reflects deductions that may not be made in determining value for Federal royalty purposes, such deductions may be added to the contract price to derive the value of production for royalty computation.

Pursuant to 30 CFR 250.64 (1982), the value of production shall not be less than gross proceeds. Consequently, a lessee is not entitled to a credit for those months when its price for natural gas liquid products is above the yardstick range established by the Procedure Paper on Natural Gas Liquid Products Valuation offsetting those months when its price was below that range.

When, in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, utilization of spot market prices is the proper methodology to value production and the lessee's price for natural gas liquid products is less than the minimum yardstick value, it is improper for MMS to use the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Where MMS utilizes spot market prices to determine the value of the production of ethane for royalty purposes and the lessee shows that during the period in question the price for the majority of ethane produced from the field or area was determined on the basis of quarterly contracts, not spot market prices, the lessee has established that MMS was not justified in using spot market prices for ethane.

Pursuant to 30 CFR 250.67(d) (1982), no allowance is available for expenses incidental to marketing natural gas liquid products, and since a lessee has a

# OUTER CONTINENTAL SHELF LANDS ACT--Continued

## OIL AND GAS LEASES--Continued

duty to market its production, it must bear the expenses incurred in discharging that obligation.

Amoco Production Co., 112 IBLA 77 (Nov. 22, 1989)

When the lessee's price for natural gas liquid products is less than the minimum yardstick value established in accordance with the Procedure Paper on Natural Gas Liquid Products Valuation, it is improper for MMS to utilize the average of the high and low prices in the yardstick range to determine the value of production. The yardstick minimum should be the price employed in such a situation.

Cities Service Oil & Gas Corp., 112 IBLA 89 (Nov. 24, 1989)

Where the low-posted spot market price for the month for natural gas liquid products is found by MMS to establish the fair market value floor for royalty valuation, a decision assessing additional royalty charges based on the difference between lessee's reported valuation and the average spot market price will be set aside and remanded.

Mobil Oil Corp., 112 IBLA 198 (Dec. 13, 1989)

## REFUNDS

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not



OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identify the claimant, the lease affected, and the reasons a refund is sought.

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)  
94 I.D. 69

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made. A payment is made when it is tendered to the appropriate agency.

Standards set forth in an opinion by the Solicitor cannot be applied as substantive requirements governing requests for refunds. The notice which must be filed to request a refund under 43 U.S.C. § 1339 (1982) must be distinguished from the proof necessary to substantiate a refund request.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

A person claiming a refund of excessive royalty payments must file a request within 2 years of the date payments were made. It is not permissible for a refund claimant to circumvent the refund procedures prescribed by Congress in sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), by "offsetting" prior alleged overpayments against future payment obligations.

Kerr-McGee Corp., 103 IBLA 338 (Aug. 9, 1988)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

Sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a), limits the authority of the Department to refund royalty overpayments to those cases where a refund request is filed within 2 years of making the overpayment.

As a general rule, overpayments of oil and gas royalties for which no claim for refund is filed within 2 years of the overpayment are properly disallowed as an offset or credit against liability for subsequent royalty underpayments.

Mobil Oil Exploration & Producing, S.E., 104 IBLA 399  
(Oct. 6, 1988)

One filing a request for repayment of excess royalties, paid with respect to gas produced from a particular Outer Continental Shelf oil and gas lease, is not precluded by the 2-year filing provision in sec. 10(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a) (1982) from recovering monies paid when the request was filed within the 2-year period but failed to correctly identify the lease and the amount paid.

Chevron U.S.A. Inc., 105 IBLA 21 (Oct. 12, 1988)

A request for a refund of royalties paid under the Outer Continental Shelf Lands Act must be made within 2 years of the date of payment in accordance with sec. 10 of the Act, 43 U.S.C. § 1339 (1982).

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

Sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the issuance of refunds for excess royalty payments only where the request for a refund is made within 2 years of the date that payment is received in the appropriate office.

Pogo Producing Co., 105 IBLA 314 (Nov. 10, 1988)

Conoco, Inc., 105 IBLA 357 (Nov. 22, 1988)

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

Allowance of setoff of royalty overpayments against royalty underpayments discovered by a Minerals Management Service audit made more than 2 years after the overpayment is confined to the individual lease under audit.

Sun Exploration & Production Co., 106 IBLA 300 (Jan. 5, 1989)

A person claiming a refund of excess royalty payments must file a request within 2 years of the date payments were made. A refund claimant may not circumvent the refund procedures prescribed by Congress in sec. 10 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), by "offsetting" prior alleged overpayments against future obligations.

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), authorizes the Secretary of the Interior to approve refunds for overpayments made in regard to Outer Continental Shelf leases. The Secretary's authority is conditioned upon a request being filed within 2 years after the date a payment is made.

MMS may not deny a request for refund of royalties from a holder of one of several working interests in several leases that remit royalties on their own behalf on the grounds that the holder has

OUTER CONTINENTAL SHELF LANDS ACT--Continued

REFUNDS--Continued

not made a showing that the lease accounts as a whole were overpaid.

Mesa Petroleum Co., 107 IBLA 184 (Feb. 14, 1989)

Because oil and gas leases are assessed royalty on an individual basis, offsetting, i.e., crediting overpayments against underpayments, is properly limited to individual lease accounts.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

Crediting within an audit of overpayments against underpayments of royalty on oil and gas leases is properly limited to individual lease accounts. Credits may not be allowed (offset) between unrelated lease accounts because oil and gas leases are individually assessed for royalty due.

Union Oil Co. of California, 110 IBLA 62 (July 20, 1989)

The offsetting of overpayments of royalty on natural gas production from an offshore oil and gas lease against underpayments of royalty may only take place after an official audit and within the royalty account of a single lease. Offsetting between leases is not permitted.

Chevron U.S.A. Inc., 111 IBLA 92 (Sept. 26, 1989)

MMS may not deny a request for refund of royalties from a holder of one of several working interests in a lease who remits royalties on its own behalf (i.e., a payor) on the grounds that the payor has not made a showing that the lease accounts as a whole were overpaid.

Where there are a number of individual working interest payors on a lease, MMS may not grant a request for a refund of royalties, even if it is established that a total lease overpayment has occurred, unless the

OUTER CONTINENTAL SHELF LANDS ACT--ContinuedREFUNDS--Continued

payor requesting the refund can show that it submitted the royalty overpayment.

Texaco Inc., 112 IBLA 174 (Dec. 11, 1989)

STATE LAWS

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)  
93 I.D. 95

STATE LEASESGenerally

The holder of an oil and gas lease of lands on the Outer Continental Shelf issued by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), must pay royalties in accordance with the provisions of the lease. When the lease provides for royalties on "all gas produced and saved or utilized," the lessee is obligated to pay royalties on gas used or flared on the lease.

Where there are divergent views of state officials concerning the interpretation of a provision of a lease maintained under sec. 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1335 (1982), the

OUTER CONTINENTAL SHELF LANDS ACT--ContinuedSTATE LEASES--ContinuedGenerally--Continued

Board will interpret the provision in accordance with general rules for construing contracts. When a royalty clause provides the lessee pay "sums equal to the value of gas produced and saved or utilized at the well, provided no gathering or other charges are made chargeable to lessor," the lessee may not deduct the cost of compressor fuel from royalties paid for gas used or flared on a sec. 6 lease.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

UNIT PLANS

Where an appellant criticizes a division of a reservoir delineated by Geological Survey on the Outer Continental Shelf on the grounds that various errors resulted in inaccurate allocation of original gas-in-place, and the evidence fails to establish that any substantial error occurred, the reservoir division will be affirmed.

The law of capture, which provides that the owner of a tract acquires title to the oil and gas which he produces from wells drilled thereon, even though part of such oil or gas migrated from adjoining lands, is fully applicable on the Outer Continental Shelf in the absence of a unitization agreement. Where, however, unitization has been ordered, allocation of production to competing tracts should normally be made on the basis of net-acre feet.

Where Geological Survey decides to deviate from a straight net-acre feet allocation of production from a common reserve, a 6-month period prior to formation of a unit agreement (during which all wells in a competitive reservoir were producing and during which the parties were negotiating the terms of the unit agreement) will not be found to be an unrepresentative period for purposes of calculating the production factor in an allocation formula.

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of



# OUTER CONTINENTAL SHELF LANDS ACT--Continued

## UNIT PLANS--Continued

the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986) 93 I.D. 95

The requirement set forth in a unit agreement to pay rental with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases but to pay minimum royalty with respect to the participating acreage does not effect a de facto segregation of such leases which would not be permitted in the absence of express statutory authorization.

The Minerals Management Service properly denies a request for a refund of rental paid with respect to the nonparticipating acreage of unitized Outer Continental Shelf oil and gas leases where the unit agreement properly requires such payment consistent with the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331-1356 (1982).

Shell Offshore Inc., 107 IBLA 165 (Feb. 13, 1989)

## PATENTS OF PUBLIC LANDS

### GENERALLY

Where lands in a grant or patent from the United

# PATENTS OF PUBLIC LANDS--Continued

## GENERALLY--Continued

States are described in terms of the rectangular surveying system, the right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to the quantity of land stated.

Where a plat of resurvey indicates that more land is included within the boundaries of a patented tract than was shown by the plat of original survey in accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

Equitable title vests in preference right applicants for public lands restored in accordance with 43 U.S.C. § 971a - e (1982) and Public Land Order No. 1613, when they have paid the purchase price and received a receipt from BLM, and BLM may properly grant them patents even though they have subsequently sold the lands adjoining the public lands.

Robert & Patricia Bailey et al., 89 IBLA 369 (Nov. 22, 1985) 92 I.D. 606

A patent of land issued by the proper officers of the United States is presumed to be valid and to pass title.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

PATENTS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

BLM has a duty to exercise its authority over mining claims to the end that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. BLM may not issue a mineral patent until it has assured itself that the applicant holds a valid mining claim by virtue of compliance with all aspects of the mining laws.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

Generally, the Board will dismiss an appeal challenging the results of a dependent resurvey if the lands on both sides of the disputed boundary have been patented to private owners prior to the time the protest is lodged.

A resurvey conducted by the Cadastral Survey is improperly undertaken to the extent it establishes boundaries between private tracts of land if the survey of those boundaries is not necessary to establish a boundary between private and Federal lands. Once patent has been issued, the rights of the patentees are fixed and the Government has no power to interfere with such rights by resurveying the boundaries.

James S. Mitchell, William Dawson, 104 IBLA 377 (Sept. 27, 1988)

Under the Confirmation Act, 43 U.S.C. § 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents, 43 U.S.C. § 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. § 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed,

PATENTS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

and gives the patentee the protection of a judicial forum.

The Confirmation Act, 43 U.S.C. § 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

A corporation organized under the laws of the United States or of any state or territory thereof may occupy and purchase mining claims from the Government, irrespective of the ownership of stock therein by persons, corporations, or associations not citizens of the United States.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

CORRECTIONS

Where one holding a patent from the United States applies to have the patent corrected to eliminate a reservation in accordance with sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), alleging that the purpose for the reservation no longer exists, the application is properly rejected where the record shows the reservation was not erroneously included in the patent on the basis of a mistake of fact.

Bill G. Minton, Marylee Minton, 91 IBLA 108 (Mar. 14, 1986)

PATENTS OF PUBLIC LANDS--ContinuedCORRECTIONS--Continued

BLM may properly reject an application to correct a homestead patent to include certain land where, although the original patentee may have intended, to enter that land, the applicant acquired the patented homestead with a specific disclaimer of any transfer of the land and, thus, has no equitable interest in the land.

Arthur Warren Jones et al., 97 IBLA 253 (May 13, 1987)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and a patent may not be corrected without the consent of the patentee.

Where a Government patent provides that land is conveyed subject to existing access, a dispute between private parties regarding a right of access cannot be adjudicated by BLM, and correction of the patent by BLM to define more clearly that access, against the wishes of the patentee, is improper.

Lone Star Steel Co., et al., 101 IBLA 369 (Mar. 29, 1988)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, in correcting errors under this statutory authority, only mistakes of fact may be corrected, not mistakes of law.

Before action may be taken to correct a patent pursuant to 43 U.S.C. § 1746 (1982), the applicant for correction must show that an error in fact was made. Once the existence of an error in fact is shown, consideration may be given to matters of equity and justice which warrant amendment of the patent.

PATENTS OF PUBLIC LANDS--ContinuedCORRECTIONS--Continued

Absent exceptional circumstances, the Department cannot amend a patent to include lands that were not subject to entry by the original entryman.

Shoshone & Arapahoe Tribes, 102 IBLA 256 (May 23, 1988)  
95 I.D. 64

Where, upon the filing of an application for conveyance of a Federally owned mineral interest, the record shows that the mineral interest previously had been conveyed by the United States to another party, BLM properly rejects the application. However, where the record also shows that the applicant, rather than the patentee, was an existing record owner of the surface estate within the meaning of sec. 209(b)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b)(2) (1982), at the time the United States conveyed the mineral interest, BLM should determine whether the patent may be corrected in accordance with sec. 316 of FLPMA, 43 U.S.C. § 1746 (1982), and failing that, recommend a suit to cancel the patent.

Michael L. Jensen, Jerilee A. Jensen, 105 IBLA 375  
(Nov. 29, 1988)

EFFECT

Where lands were patented under a statute which authorized the granting of nonmineral lands only, the issuance of the patent generally constituted a conclusive determination by the United States of the non-mineral character of the land so patented, and the subsequent discovery of mineral values thereon does not operate to void the conveyance by the United States.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)



PATENTS OF PUBLIC LANDS--ContinuedEFFECT--Continued

When the United States patents "nonmineral" land to the State of Washington in exchange for State land located within a national forest, the issuance of a patent constitutes a conclusive determination by the United States that the land was nonmineral in character, and, in the absence of fraud, any subsequent identification or discovery of minerals thereon does not operate to void the conveyance by the United States or to create a reservation of the minerals in the United States. Therefore, mining claims located on "nonmineral" land patented to the State without reservation of the mineral estate are null and void ab initio, even though the State at one time mistakenly concluded that the patent did not convey the mineral estate.

David C. Brookens, 85 IBLA 1 (Jan. 30, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are null and void ab initio. Attempts to record such mining claims or file affidavits of assessment work or notices of intent to hold such mining claims are properly rejected.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

Land which has been patented without a reservation of minerals to the United States is not available for the location of mining claims. Mining claims located on such lands are void ab initio.

Ralph C. Memmott, 88 IBLA 363 (Sept. 27, 1985)

Ralph C. Memmott, 88 IBLA 367 (Sept. 27, 1985)

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are not subject to location under the mining laws in the absence of specific statutory or regulatory authorization. Minerals reserved to the United States in a patent to the City of Rifle, Colorado, are not subject to the mining law, since no

PATENTS OF PUBLIC LANDS--ContinuedEFFECT--Continued

statute or regulation provides for their disposition under the mining law.

Richard G. Bradley, 89 IBLA 281 (Nov. 8, 1985)

Applications for lands to which the title has passed by issuance of a legal patent must be rejected.

B. L. & Norma Jean Newman et al., 92 IBLA 314 (June 26, 1986)

The effect of an interim conveyance is to convey legal title from the United States. Applications for lands to which the United States no longer holds title must be rejected.

Gale & Erma Doggett et al., 92 IBLA 316 (June 26, 1986)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment

PATENTS OF PUBLIC LANDS--ContinuedEFFECT--Continued

applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuanguaruak, Mollie Itta, Wilber Ahtuanguaruak, 97 IBLA 261 (May 13, 1987)

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknown.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

PATENTS OF PUBLIC LANDS--ContinuedEFFECT--Continued

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

A patent of land issued by the proper officers of the United States is presumed to be valid and to pass title.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Where, upon the filing of an application for conveyance of a Federally owned mineral interest, the record shows that the mineral interest previously had been conveyed by the United States to another party, BLM properly rejects the application. However, where the record also shows that the applicant, rather than the patentee, was an existing record owner of the surface estate within the meaning of sec. 209(b)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b)(2) (1982), at the time the United States conveyed the mineral interest, BLM should determine whether the patent may be corrected in accordance with sec. 316 of FLPMA, 43 U.S.C. § 1746

PATENTS OF PUBLIC LANDS--ContinuedEFFECT--Continued

(1982), and failing that, recommend a suit to cancel the patent.

Michael L. Jensen, Jerilee A. Jensen, 105 IBLA 375 (Nov. 29, 1988)

When a patent without reservation of minerals to the United States is issued subsequent to the location of a placer mining claim on the same land, the effect is to remove from the jurisdiction of this Department the consideration of questions concerning rights to the land.

Kenneth Russell, 109 IBLA 180 (June 9, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

A decision rejecting application for a recordable disclaimer of mineral interest will be affirmed on appeal where the record shows that more than 12 years have elapsed between the time the owner-applicant knew or should have known of the alleged claim attributed to the United States and the date application for disclaimer was made to the Department. 43 CFR 1864.1-3.

T. Jack Foster Trust A, 111 IBLA 392 (Nov. 8, 1989)

PATENTS OF PUBLIC LANDS--ContinuedRESERVATIONS

Language excluding mineral lands which was included in a patent of railroad grant lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon later discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

Where land has been patented under a railroad land grant and only the surface estate has been reconveyed to the United States, a mining claim located on such land is properly declared null and void ab initio because the United States does not own the mineral deposits in the lands.

August F. Plachta, 88 IBLA 304 (Sept. 16, 1985)

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are not subject to location under the mining laws in the absence of specific statutory or regulatory authorization. Minerals reserved to the United States in a patent to the City of Rifle, Colorado, are not subject to the mining law, since no statute or regulation provides for their disposition under the mining law.

Richard G. Bradley, 89 IBLA 281 (Nov. 8, 1985)

A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, as amended, 30 U.S.C. § 121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

Robert D. Lanier et al., 90 IBLA 293 (Feb. 20, 1986)  
93 I.D. 66



PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294 (1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986)  
93 I.D. 179

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary, with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer,  
95 IBLA 144 (Jan. 12, 1987)  
94 I.D. 1

PATENTS OF PUBLIC LANDS--Continued

RESERVATIONS--Continued

As provided by 43 CFR 3811.2-9, lands patented with mineral reservations to the United States under the Taylor Grazing Act, 43 U.S.C. § 315g (1970), are subject to appropriation under the mining or mineral leasing laws for the reserved minerals.

Edward Lore, 97 IBLA 340 (May 21, 1987)

Amax Specialty Metals Corp., 100 IBLA 60 (Nov. 24, 1987)

A patent issued pursuant to the Homestead Act of May 20, 1862, as amended, 43 U.S.C. § 161 (1976), cannot be construed as reserving to the United States minerals not specifically reserved therein.

Where public lands are disposed of with a reservation of minerals to the United States, the reserved minerals are subject to location under the mining laws when Congress has expressly authorized mineral location of reserved minerals in the legislation providing for the reservation. Sec. 8 of the Taylor Grazing Act, 43 U.S.C. § 315g(d) (1970).

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Under sec. 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1982), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, only mistakes of fact may be corrected, not mistakes of law, and a patent may not be corrected without the consent of the patentee.

Where a Government patent provides that land is conveyed subject to existing access, a dispute between private parties regarding a right of access cannot be adjudicated by BLM, and correction of the patent by BLM to define more clearly that access, against the wishes of the patentee, is improper.

Lone Star Steel Co., et al., 101 IBLA 369 (Mar. 29, 1988)

# PATENTS OF PUBLIC LANDS--Continued

## RESERVATIONS--Continued

A patent for land within the Black Hills National Forest, which provides, in accordance with sec. 3 of the Act of June 11, 1906, as amended, ch. 3074, 34 Stat. 234 (1906), that all entries are subject to the lode mining laws of the United States, does not constitute a reservation of minerals to the United States, and a lode mining claim thereafter located on that land is null and void ab initio.

Homestake Mining Co., 104 IBLA 357 (Sept. 23, 1988)

## SUITS TO CANCEL

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985) 92 I.D. 109

The Department is barred by provision of 43 U.S.C. § 1166 (1982), from challenging the sufficiency of a patent issued to Arizona in 1940, since more than 6 years have passed since patent issued.

Lynn M. Sheppard, 90 IBLA 23 (Dec. 4, 1985) 92 I.D. 613

# PATENTS OF PUBLIC LANDS--Continued

## SUITS TO CANCEL--Continued

The Department is barred from initiating action to vacate and annul a patent of public lands 6 years after the date of issuance of the patent, unless the patent was procured by fraud.

Alamin Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent, which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

PATENTS OF PUBLIC LANDS--Continued

SUITS TO CANCEL--Continued

Where, upon the filing of an application for conveyance of a Federally owned mineral interest, the record shows that the mineral interest previously had been conveyed by the United States to another party, BLM properly rejects the application. However, where the record also shows that the applicant, rather than the patentee, was an existing record owner of the surface estate within the meaning of sec. 209(b)(2) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b)(2) (1982), at the time the United States conveyed the mineral interest, BLM should determine whether the patent may be corrected in accordance with sec. 316 of FLPMA, 43 U.S.C. § 1746 (1982), and failing that, recommend a suit to cancel the patent.

Michael L. Jensen, Jerilee A. Jensen, 105 IBLA 375 (Nov. 29, 1988)

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

PAYMENTS

(See also Accounts--if included in this Index.)

GENERALLY

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

Richard G. Fowler, 89 IBLA 175 (Oct. 11, 1985)

Under sec. 4 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A) (1982), the civil and criminal laws of each adjacent state, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf which would be within the area of the state if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf to the extent that such laws are applicable and not inconsistent with 43 U.S.C. §§ 1331-1356 (1982) or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted. Application of Louisiana law, calling for 7 percent simple interest, the legal rate at the time



PAYMENTS--ContinuedGENERALLY--Continued

the unit agreement was made, was proper to compensate a lessee for the time value of money held by a unit participant who produced unitized substances in excess of its allocated share.

Sun Oil Co. et al., 91 IBLA 1 (Feb. 28, 1986)  
93 I.D. 95

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

A single personal check covering four competitive oil and gas lease bid deposits is not an acceptable form of remittance under 43 CFR 3120.4-1, which requires remittances to be submitted in the form specified in the competitive sale notice, when that notice requires bidders to submit separate bids with a bid deposit by guaranteed remittance, i.e., cash, cashier's check, or postal money order.

George H. Fentress, 99 IBLA 184 (Oct. 13, 1987)

30 CFR 218.200 (1985) authorizes the Minerals Management Service to impose a late payment interest charge where royalty payments for coal leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the Government for loss of use of funds due but not paid.

Cyprus Western Coal Co., 103 IBLA 278 (Aug. 3, 1988)

PAYMENTS--ContinuedGENERALLY--Continued

30 CFR 218.54(a) authorizes the Minerals Management Service to impose a late payment interest charge where royalty payments for offshore oil and gas leases are untimely or improper. The imposition of late payment charges is appropriate to compensate the United States for loss of use of funds which it is due under an express royalty computation and payment program.

Sun Exploration & Production Co., 104 IBLA 178 (Sept. 9, 1988)

30 CFR 218.54 authorizes the Minerals Management Service to assess late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of funds due but not paid.

Cities Service Oil & Gas Corp., 104 IBLA 291 (Sept. 14, 1988)

Santa Fe Energy Co., 106 IBLA 333 (Jan. 10, 1989)

Santa Fe Energy Co., 107 IBLA 121 (Feb. 2, 1989)

MMS does not abuse its discretion in failing to waive payment of interest charges for late payments of royalties where a Notice to Lessees concerning those payments is not so confusing as to make imposition of the charges inequitable.

Sonat Exploration Co., et al., 105 IBLA 97 (Oct. 24, 1988)

MMS properly assesses late payment interest charges if royalty payments for oil and gas leases are unpaid or underpaid on the date the amounts are due. The imposition of late payment charges is appropriate to compensate the Government for the loss of the time value of the funds due but not paid.

Santa Fe Energy Co., 107 IBLA 32 (Jan. 25, 1989)

PAYMENTS--ContinuedGENERALLY--Continued

Late payment interest charges are properly assessed if royalty payments for oil and gas are underpaid when due.

Dugan Production Corp., 107 IBLA 91 (Feb. 1, 1989)

Late payment interest charges are properly assessed against payments of royalty made in Feb. and Mar. 1983, for gas produced and removed from a Federal lease 'from June 1981 through Jan. 1983.

Christmann Energy Corp., 107 IBLA 179 (Feb. 14, 1989)

Where MMS imposes late payment charges in accordance with 30 CFR 218.200(a) (1986), a coal lessee may not invoke the estimated payment exception in that regulation when there is no evidence that the lessee sought prior authorization from MMS to make estimated payments.

Utah International, Inc., 107 IBLA 217 (Feb. 21, 1989)

The Minerals Management Service is authorized to impose late payment charges or exact interest as compensation for the loss of use of money due but not paid as royalties.

Mesa Petroleum Co., 108 IBLA 149 (Apr. 5, 1989)

When Minerals Management Service determines value for royalty purposes, the burden to show error in the determination is on the lessee. Absent a showing of error, the determination of items of cost and revenue to be included in a manufacturing allowance are found to be correct.

When a lessee processes gas for recovery of liquid hydrocarbons, pursuant to 30 CFR 206.152 (1986) it must pay royalty either on the value of the wet gas before processing or the value of the residue gas after processing plus the value of the extracted liquids. The allowance which may not exceed two-thirds of the value

PAYMENTS--ContinuedGENERALLY--Continued

of the liquids. When calculating the formula to be used for this purpose, it was error to include either the cost or value of processing condensate which was not derived from wet gas produced at the plant.

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp. & Mobil Exploration & Producing Services, Inc., 108 IBLA 216 (Apr. 19, 1989)

MMS is authorized to impose an interest charge where it determines that a royalty payor has failed to pay timely the proper amount of royalty due on the value of production of wet gas.

Where a royalty payor submits funds to MMS in response to a demand for alleged underpayments of royalties, and MMS subsequently refunds a portion of those funds, the payor is not entitled to interest on the refunded amount.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

MMS properly assessed late payment interest charges where a late royalty payment was made by an oil and gas lessee's bank using electronic funds transfer 1 day after payment was due.

Union Exploration Partners, Ltd., 112 IBLA 140 (Dec. 4, 1989)

PAYMENTS--ContinuedREFUNDS

A refund of advance rental payments tendered in connection with a noncompetitive oil and gas lease may be ordered where it is determined after administrative litigation that the lease issued to a party other than the first-qualified applicant and, hence, cancellation is required, if the lessee has been deprived of the benefit of the lease and there has been no intent to defraud the Department and the public.

Emery Energy, Inc., 90 IBLA 70 (Dec. 16, 1985)

Refunds of advance rental payments tendered in connection with noncompetitive over-the-counter oil and gas lease offers which are rejected or withdrawn prior to lease issuance are properly issued to the offeror(s), the real party(ies) in interest, pursuant to sec. 304(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1734(c) (1982).

Frederick Alan Maxwell, 95 IBLA 267 (Jan. 27, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

It was proper for BLM to cancel a sale of public land following acceptance of high bids when the sale was found to be contrary to an injunction entered in Nat'l Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). In such case a refund of deposits submitted with the high bids was proper. However, in the absence of express statutory authority, no interest on the funds deposited may be paid by BLM.

Gordon L. Hardy, 106 IBLA 227 (Dec. 27, 1988)

PHOSPHATE LEASES AND PERMITS  
(See also Mineral Leasing Act--if included in this Index.)

GENERALLY

Transportation costs unrelated to the manufacturing process are not properly included in the formulation of a manufacturing allowance to be used in calculating the royalty value of natural gas liquid products.

When formulating a manufacturing allowance for purposes of calculating royalty, an allowance for expenses incidental to marketing ethane gas was properly denied. When calculating royalty pursuant to 30 CFR 206.150 (1986), the value of production shall not be less than fair market value, nor less than gross proceeds accruing from disposition of produced gas.

Mobil Oil Corp., 112 IBLA 198 (Dec. 13, 1989)

PERMITS

A BLM decision to designate an area as a known phosphate leasing area which did not give consideration to intrinsic economic factors is invalid, and cannot serve as a proper basis to reject a phosphate prospecting permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982). Where BLM, in adjudicating a phosphate prospecting permit application, determines the workability of phosphate deposits in an area based on limited considerations of whether mining was technically feasible, the decision will be set aside and the case remanded to BLM for further adjudication.

Where the existence and workability of phosphate in an area is not known, the Secretary is authorized pursuant to 30 U.S.C. § 211(b) (1982), to issue prospecting permits. However, the Secretary has discretionary authority not to issue a permit where a determination has been made in the first instance that phosphate development would not be in the national interest.

Elizabeth B. Archer et al., 102 IBLA 308 (May 31, 1988)



POTASSIUM LEASES AND PERMITS  
(See also Mineral Leasing Act--if included in this Index.)

GENERALLY

Regardless of any deficiency in the readjustment of a potassium lease, the matter will be entitled to repose under the doctrine of administrative finality in the absence of any timely objection by the lessee or the owner of an overriding royalty interest after notice of the readjustment and in the absence of any compelling legal or equitable reasons for further review.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

LEASES

Pursuant to 43 CFR 3533.4(b), an applicant for a potassium preference right lease whose application is rejected by the Bureau of Land Management is entitled to a hearing before an Administrative Law Judge, if the applicant has alleged in the application facts the applicant believes to be sufficient to show entitlement to a lease.

Earth Sciences, Inc., 106 IBLA 313 (Jan. 6, 1989)

ROYALTIES

BLM may properly reduce the overriding royalty rate for a potassium lease pursuant to regulatory authority previously incorporated into the lease at the time of readjustment, notwithstanding the fact that the rate was originally established prior to the original promulgation of that regulatory authority.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

POWERSITE LANDS

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

United States Forest Service v. Walter D. Milender, 175 86 IBLA 181 (Apr. 30, 1985) 92 I.D. 175

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a powersite is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1982), did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a powersite classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

POWERSITE LANDS--Continued

Lands withdrawn for powersite purposes do not become available for homestead entry until an order of restoration is issued. No rights may be acquired by a settler on public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.

Shoshone & Arapahoe Tribes, 102 IBLA 256 (May 23, 1988) 95 I.D. 64

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), a "general permission" to engage in placer operations is always a possibility. Such a "general permission," however, means all operations are to be carried out under existing laws regulating mining.

The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened powersites to entry under the mining laws. To determine whether placer mining should be allowed pursuant to the Act, there must be a determination made whether there is a substantial use of the land for other purposes which warrants a prohibition of mining.

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Secretary of the Interior may, but is not required to, hold a hearing to determine whether placer mining operations should be prohibited, generally permitted, or permitted subject to a requirement that the land be restored to its condition prior to mining. In making this determination, the only limitation placed upon the Secretary's discretion is the requirement that his order must be "appropriate."

To determine whether mining would "substantially interfere" with other uses of powersite lands within the meaning of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department is required to engage in a weighing or balancing of the benefits of mining against the injury mining would cause to other uses of the land. Mining may be allowed where the benefits of mining outweigh the benefits to other uses.

POWERSITE LANDS--Continued

Under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), the Department possesses authority to condition mining plan approval upon reclamation of the mined land to the same condition as it was found prior to mining.

Departmental regulation 43 CFR 3738.1 provides that, in cases where there has been a hearing before an Administrative Law Judge which has resulted in an order that placer mining shall be allowed in a power-site withdrawal provided that the miner shall restore the land to the condition in which it was immediately prior to mining, there shall be a bond to insure reclamation.

United States Forest Service v. Walter D. Milender, 155 IOLA 207 (Sept. 12, 1988) 95 I.D. 155

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

PRACTICE BEFORE THE DEPARTMENT

(See also Rules of Practice--if included in this Index.)

GENERALLY

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

## PRACTICE BEFORE THE DEPARTMENT--Continued

### PERSONS QUALIFIED TO PRACTICE

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

Practice before the Interior Board of Land Appeals is controlled by 43 CFR 1.3. An appeal brought by a person who does not fall within any of the categories of persons authorized to practice before the Department is subject to dismissal.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)

## PRIVATE EXCHANGES

(See also Exchanges of Land--if included in this Index.)

### GENERALLY

A surface-only private exchange undertaken pursuant to sec. 11 of the Relocation Act, 25 U.S.C. § 640d-10(a)(1) (1982), over the objection of the owner of the mineral interest in the private land involved in the exchange does not violate that Act. The Act imposes no legal requirement on the Secretary of the Interior to acquire such interest.

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982), is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands

## PRIVATE EXCHANGES--Continued

### GENERALLY--Continued

anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

### EQUAL VALUES

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), states that the values of lands exchanged by the Secretary under the Act either shall be equal, or if not equal, should be equalized by the payment of money to the grantor or to the Secretary as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)



PRIVATE EXCHANGES--ContinuedPROTESTS

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Where BLM denies a request by a private land owner for access across Federal lands selected in a private exchange proposal on the basis that historical access to the private lands has been across other private lands not associated with the exchange and that the requested access would provide no public benefit, such a determination will be upheld where the one

PRIVATE EXCHANGES--ContinuedPROTESTS--Continued

seeking access fails to establish error in the BLM determination.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any State or of the United States.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

Sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), provides that no tract of land may be disposed of under the Act, whether by sale, exchange, or donation, to any person who is not a citizen of the United States, or in the case of a corporation, is not subject to the laws of any state or of the United States. A trustee who is a citizen of the United States is not a proper exchange proponent under sec. 207 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1717 (1982), where all beneficiaries of the trust are aliens.

Havasu Heights Ranch & Development Corp., 102 IBLA 1 (Apr. 5, 1988)

PRIVATE EXCHANGES--Continued

## PUBLIC INTEREST

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

Nat'l Wildlife Federation et al., 87 IBLA 271 (June 25, 1985)

A BLM decision to proceed with a proposed land exchange of public land containing wetlands and situated within a floodplain pursuant to sec. 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1982), as consistent with the public interest, will be vacated and remanded where the record shows that BLM did not consider including in the deed of conveyance a requirement to preserve the beneficial values of the floodplain consistent with Executive Order No. 11988 and BLM floodplain guidelines.

Mendiboure Ranches, Inc., et al., 90 IBLA 360 (Feb. 27, 1986)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands or any interests therein if the public interest will be well served by such exchange.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), authorizes the Secretary of the Interior to exchange public lands or any interest therein if the public interest will be well served by such exchange.

Sec. 206(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b) (1982), provides that the values of lands exchanged by the Secretary under the Act shall be equal, or if not equal, shall be equalized by the payment of money to the grantor or to the Secretary, as the circumstances require, so long as payment does not exceed 25 percent of the total value

PRIVATE EXCHANGES--Continued

## PUBLIC INTEREST--Continued

of the lands or interests transferred out of Federal ownership.

Havasu Heights Ranch & Development Corp., 102 IBLA 1 (Apr. 5, 1988)

Sec. 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(a) (1982), authorizes the Secretary of the Interior to exchange public lands, or an interest therein, if the public interest will be well served by such exchange. Protests against an exchange are properly dismissed if the protestants do not establish that the proposed exchange would violate the Act, applicable regulations, or contravene the public interest.

City of Santa Fe et al., 103 IBLA 397 (Aug. 15, 1988)

PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands--if included in this Index.)

## GENERALLY

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas

PUBLIC LANDS--ContinuedGENERALLY--Continued

sufficient to form the basis for claiming compensatory royalty because of drainage.

Doris Slaaten, 107 IBLA 16 (Jan. 25, 1989)

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

ADMINISTRATION

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986)  
93 I.D. 394

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

PUBLIC LANDS--ContinuedADMINISTRATION--Continued

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

During the period a wilderness study area is being reviewed so that the Secretary may make his recommendation to the President as to the area's suitability or nonsuitability for preservation as wilderness, and until Congress has reached its decision on the matter, BLM is required to manage the lands so as not to impair their suitability for preservation as wilderness. When a plan of operations is rejected by BLM because the proposed activity will impair the area's suitability for preservation as wilderness, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

Manville Sales Corp., 102 IBLA 385 (June 17, 1988)

ALASKA

Equitable title vests in preference right applicants for public lands restored in accordance with 43 U.S.C. § 971a - e (1982) and Public Land Order No. 1613, when they have paid the purchase price and received a receipt from BLM, and BLM may properly grant them patents even though they have subsequently sold the lands adjoining the public lands.

Robert & Patricia Bailey et al., 89 IBLA 369 (Nov. 22, 1985)  
92 I.D. 606

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)



PUBLIC LANDS--ContinuedALASKA--Continued

Pursuant to sec. 3(c) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1602(e) (1982), BLM may properly exclude from an interim conveyance land which was used seasonally in connection with the administration of a Federal installation during the period of time that the land was available for selection by a Native village corporation, regardless of the amount of use occurring after the appropriate selection period.

Ahtna, Inc., 107 IBLA 266 (Feb. 23, 1989)

APPRAISALS

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

Exxon Corp., 106 IBLA 207 (Dec. 21, 1988)

CLASSIFICATION

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim

PUBLIC LANDS--ContinuedCLASSIFICATION--Continued

across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

PUBLIC LANDS--ContinuedDISPOSALS OFGenerally

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), is deemed to have exhausted his rights under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

Heirs of George Martinez, Heirs of Arthur Chavez,  
103 IBLA 375 (Aug. 15, 1988)

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

Exxon Corp., 106 IBLA 207 (Dec. 21, 1988)

PUBLIC LANDS--ContinuedDISPOSALS OF--ContinuedGenerally--Continued

It was proper for BLM to cancel a sale of public land following acceptance of high bids when the sale was found to be contrary to an injunction entered in Nat'l Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). In such case a refund of deposits submitted with the high bids was proper. However, in the absence of express statutory authority, no interest on the funds deposited may be paid by BLM.

Gordon L. Hardy, 106 IBLA 227 (Dec. 27, 1988)

JURISDICTION OVER

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravels an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on Federal noncompetitive oil and gas leases within a national forest.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

PUBLIC LANDS--ContinuedJURISDICTION OVER--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership and which are, hence, no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment.

If the Department conveyed land prior to the final adjudication of a pending Native allotment application, the Department would no longer have jurisdiction over the land. Nevertheless, a hearing may be required to decide disputed issues of fact to determine whether the applicant had established a valid existing right to an allotment on the date of conveyance which would warrant initiation of action to recover the land. A hearing is not required if an applicant's allegations of material fact are insufficient, as a matter of law, to establish a valid existing right to an allotment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application was not pending on the date of conveyance, or, if the application was previously relinquished, there is no showing that the relinquishment was neither voluntary nor knowing.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the allotment application indicates that use and occupancy began after the land had been withdrawn, or that the applicant was too young as a matter of law to have initiated qualifying use and occupancy at the time of the withdrawal.

Heirs of Doreen Itta, Bernice Ahtuanguak, Mollie Itta, Wilber Ahtuanguak, 97 IBLA 261 (May 13, 1987)

PUBLIC LANDS--ContinuedJURISDICTION OVER--Continued

Sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), did not operate to legislatively approve Native allotments on land conveyed out of Federal ownership before the enactment of ANILCA. Legislation passed by Congress concerning disposition of the public lands cannot generally transfer title to lands previously conveyed into private ownership which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law, a violation of the Fifth Amendment.

Although the Department may seek cancellation of a conveyance which includes land described by a valid Native allotment application, a Native allotment applicant has no valid existing right to an allotment for land conveyed if the application was previously relinquished, unless there is a showing that the relinquishment was either involuntary or unknowing.

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

Under North Dakota law, when a county conveys lands acquired through tax proceedings, it must convey all its interest in such lands; an attempted reservation of any part of its interest is void. Where such lands were subsequently acquired by the United States through condemnation proceedings, BLM properly declared the counties' attempted reservation of royalty and mineral interests invalid.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of



PUBLIC LANDS--ContinuedJURISDICTION OVER--Continued

statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)

96 I.D. 439

PUBLIC LANDS--ContinuedJURISDICTION OVER--Continued

An Alaska Native allotment which has not automatically vested pursuant to ANILCA is properly adjudicated under the Act of May 17, 1906. The question of the validity of the application is separate and apart from the issue of the ownership of the lands named in the application, and the Department has the jurisdiction to address this question, even though the lands described in the application, may have been congressionally conveyed to another party. The Department had an ongoing trust obligation to Alaska Natives, and therefore retains jurisdiction to determine the validity of the Native allotment application. This action is necessary in order to determine whether it is necessary for the Department to take action to recover the land for the benefit of the Native applicant.

Kootznookwoot, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

The effect of issuing a Native Allotment, like the issuance of patent, is to transfer the legal title from the United States and to remove the Department's jurisdiction to resolve conflicts concerning rights to the land.

The Bureau of Land Management's approval of a Native allotment application vests equitable title, but does not vest legal title. This equitable title is susceptible of being administratively modified or revoked by the Department if, prior to issuance of a Native Allotment, the Department finds that the land in question, or any part of it, was not vacant, unappropriated, and unreserved nonmineral land during the period of the applicant's use and occupancy.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

LEASES AND PERMITS

BLM has the authority to issue notices of incidents of noncompliance, e.g., for failure to regravell an access road and to remove reserve pit fluids, and to levy an assessment under 43 CFR 3163.3 (1983) with respect to the operation of oil and gas wells on

PUBLIC LANDS--ContinuedLEASES AND PERMITS--Continued

Federal noncompetitive oil and gas leases within a national forest.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

BLM does not have the authority under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

Phillips Petroleum Co., 105 IBLA 345 (Nov. 17, 1988)

RIPARIAN RIGHTS

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

PUBLIC LANDS--ContinuedSPECIAL USE PERMITS

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting

PUBLIC LANDS--ContinuedSPECIAL USE PERMITS--Continued

a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures,  
100 IBLA 151 (Dec. 3, 1987)

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle observed trials event when there is evidence that the proposed use would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

Southern California Trials Ass'n, 104 IBLA 141  
(Sept. 2, 1988)

It was proper for BLM to place the holder of a special recreation permit for commercial use of a wild and scenic river on probationary status. The evidence established that the permittee gave an authorized officer of BLM inaccurate information on a trip ticket. To do so was a specified violation of the permit stipulations, and the sanction imposed by BLM was called for in the permit stipulations.

Rogue Excursions Unlimited, Inc., 104 IBLA 322  
(Sept. 20, 1988)

PUBLIC RECORDS

(See also Administrative Procedure, Confidential Information--if included in this Index.)

Where the official records of the Department disclose that mining claims were located on land withdrawn from location under the mining law, those claims are null and void ab initio, and the fact that the withdrawal was overlooked in an earlier proceeding does not bar the Department from later asserting the withdrawal.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

PUBLIC RECORDS--Continued

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

PUBLIC SALESGENERALLY

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

Sec. 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719 (1982), requires that all conveyances of title issued by the Secretary with certain express exceptions, reserve to the United States all minerals in the land, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. The fact that there existed no outstanding mineral interests of record as of the



PUBLIC SALES--ContinuedGENERALLY--Continued

date of patent issuance did not preclude the United States from reserving the mineral interests.

Port Kendall, Inc., 93 IBLA 221 (Aug. 20, 1986)

Where the regulations in 43 CFR 2711.1-2(a) governing a notice of realty action for public sale require that a notice identifying a tract for sale be sent to parties in interest by BLM 60 days prior to the sale, and provide for a 45-day comment period, a notice not timely sent to an interested party will not negate the sale where the party asserting the deficiency had actual notice of the sale, had an opportunity to comment and participate in the sale, and was not prejudiced by BLM's failure to provide a timely notice.

Richard D. & Virginia Troon, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. To the extent, however, that the method of sale or the procedures used in conducting the sale are challenged, such matters are properly subject to appeal under 43 CFR 4.410.

George Schultz, 94 IBLA 173 (Oct. 29, 1986)

Under 43 CFR 4.410, standing to appeal is limited to a party to the case adversely affected by the decision appealed from. A party who expresses no intention to purchase an isolated tract of Federal land by submitting a competitive bid on the tract lacks standing to appeal the manner in which the sale is conducted.

Kenneth W. Bosley, 101 IBLA 52 (Jan. 26, 1988)

PUBLIC SALES--ContinuedGENERALLY--Continued

A notice of realty action issued by the Bureau of Land Management to notify the public of a proposed direct sale of public land and to solicit comments on the proposal is not a decision subject to appeal under 43 CFR 4.410, since it is merely an announcement of action proposed to be taken.

Although a person who files a protest to a proposed direct sale of public land becomes a party to a case within the meaning of 43 CFR 4.410 when the protest is denied and a timely appeal is filed, in order to maintain an appeal, the person must show an interest which has been adversely affected by the decision.

Kenneth W. Bosley, 102 IBLA 235 (May 19, 1988)

BLM's failure to send a notice to the co-owner of an adjoining parcel of land as required by 43 CFR 2711.1-2(a) will not vitiate a public sale of the parcel by modified competitive bidding procedure where the co-owner had actual knowledge of the sale prior to the sale date and subsequently participated in the sale.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

PUBLIC SALES--ContinuedGENERALLY--Continued

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982), is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. An appeal of the decision to sell a tract of land, as distinguished from an appeal of the method of sale or the procedures used in conducting the sale, is properly dismissed by the Board for lack of jurisdiction.

Idaho Dept. of Fish & Game, 112 IBLA 72 (Nov. 22, 1989)

APPLICATIONS

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

APPRAISALS

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

Exxon Corp., 106 IBLA 207 (Dec. 21, 1988)

PUBLIC SALES--ContinuedBIDDING

BLM may properly decide to make a direct sale of an isolated parcel of public land to an existing grazing user, who is also one of the adjoining landowners, rather than engage in regular or modified competitive bidding, under sec. 203(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713(f) (1982).

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

CANCELLATION

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

It was proper for BLM to cancel a sale of public land following acceptance of high bids when the sale was found to be contrary to an injunction entered in Nat'l Wildlife Federation v. Burford, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987). In such case a refund of deposits submitted with the high bids was proper. However, in the absence of express statutory authority, no interest on the funds deposited may be paid by BLM.

Gordon L. Hardy, 106 IBLA 227 (Dec. 27, 1988)

PUBLIC SALES--ContinuedCANCELLATION--Continued

Under the provisions of 43 CFR 2711.3-3(d) and 43 CFR 2711.3-1(f) and (g), a direct sale of public land may not, as a general rule, be cancelled after BLM has accepted the tender of the purchase price.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

PREFERENCE RIGHTS

Under 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which gives an adjacent landowner a preference right to purchase land by meeting the highest bid. A bidder who fails to object to such a procedure during the time provided by a notice of sale cannot seek to have the procedure changed after the sale has taken place.

Luther D. Moss, 89 IBLA 171 (Oct. 11, 1985)

Equitable title vests in preference right applicants for public lands restored in accordance with 43 U.S.C. § 971a - e (1982) and Public Land Order No. 1613, when they have paid the purchase price and received a receipt from BLM, and BLM may properly grant them patents even though they have subsequently sold the lands adjoining the public lands.

Robert & Patricia Bailey et al., 89 IBLA 369 (Nov. 22, 1985)  
92 I.D. 606

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

PUBLIC SALES--ContinuedPREFERENCE RIGHTS--Continued

Under sec. 203(f) of FLPMA, 43 U.S.C. § 1713(f) (1982) and 43 CFR 2711.3-2, the Bureau of Land Management is authorized to offer land for sale by a modified competitive bidding procedure which adequately accommodates the preference rights of the adjacent landowners where they all have an equal opportunity to submit sealed bids for a small parcel that does not lend itself to a division among the adjoining landowners and the record does not support a direct sale to any one of the preference bidders.

Richard D. & Virginia Troon, Alan & Judith A. Gallion, 93 IBLA 256 (Aug. 27, 1986)

The failure of a high bidder to include proof of United States citizenship with a sealed bid is a curable defect not requiring rejection of a bid submitted pursuant to modified competitive bidding procedures.

Stephen J. Stagnaro et al., 107 IBLA 323 (Mar. 8, 1989)

RAILROAD GRANT LANDS

Language excluding mineral lands which was included in a patent of railroad grant lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon later discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

August F. Plachta, 88 IBLA 304 (Sept. 16, 1985)

BLM properly declares a mining claim null and void ab initio where the land has been reconveyed to the United States with a mineral reservation to the grantor or his predecessor in interest, even though the original conveyance from the United States was pursuant to sec. 3 of the Act of July 27, 1866, 14 Stat. 294



RAILROAD GRANT LANDS--Continued

(1866), which expressly excluded mineral lands from the operation of the Act.

Gold-West Industries, Inc., 90 IBLA 372 (Feb. 27, 1986)

An application for patent filed on behalf of the successor-in-interest to the grantee, as innocent purchaser for value from the railroad, pursuant to sec. 321(b) of the Transportation Act of 1940, is properly rejected when the land was known to be mineral in character at the time of conveyance, because title to land known to be mineral in character did not pass pursuant to the railroad grant statutes. If the applicant disputes this finding, a hearing is ordinarily required.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

RECLAMATION HOMESTEADS

(See also Homesteads (Ordinary)--if included in this Index.)

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

Hulda Boutsen, 90 IBLA 310 (Feb. 24, 1986)

RECLAMATION HOMESTEADS--Continued

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c)(2).

George W. Hammer et al., 95 IBLA 105 (Dec. 31, 1986)

RECLAMATION LANDS

(See also Irrigation Claims, Rights-of-Way--if included in this Index.)

## GENERALLY

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness

RECLAMATION LANDS--ContinuedGENERALLY--Continued

to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

Land acquired by the United States does not become public land by the mere process of its acquisition and, in the absence of specific statutory direction to the contrary, is not open for location of mining claims under 30 U.S.C. § 22 (1982).

Ted Thompson, 98 IBLA 251 (July 7, 1987)

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Harges Mining Co., 102 IBLA 169 (May 3, 1988)

RECLAMATION LANDS--ContinuedGENERALLY--Continued

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery" prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154 (Sept. 6, 1988) 95 I.D. 142

RECREATION AND PUBLIC PURPOSES ACT

Where a cemetery site is to be conveyed to a city, an appropriate purchase price must be paid in consideration. Although once a military cemetery, the site may not be conveyed without monetary consideration as a historic monument where the military dead have been removed and the city intends to continue to utilize it as it has been used for decades, as a

RECREATION AND PUBLIC PURPOSES ACT--Continued

typical civilian community cemetery for the benefit of residents.

City of Eagle, Alaska, 87 IBLA 323 (June 26, 1985)

Grazing use of land administered by a county government as a result of a grant to that governmental body pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), will not be credited as "historical use" for the purposes of adjudicating the competing qualifications of grazing applications pursuant to 43 CFR 4130.1-2.

Lewis M. Webster v. Bureau of Land Management, 97 IBLA 1 (Apr. 16, 1987)

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

San Juan County, 102 IBLA 155 (Apr. 29, 1988) 95 I.D. 61

"Political subdivision." Although a provision of the Recreational and Public Purposes Act, 43 U.S.C. § 869-1(d) (1982), authorizes issuance of leases for public land to nonprofit corporations, this authority does not extend to revested Oregon and California railroad grant lands which may be leased only to states and counties, state and Federal instrumentalities and political subdivisions, and municipal corporations. A

RECREATION AND PUBLIC PURPOSES ACT--Continued

nonprofit corporation which is not a "political subdivision" within the meaning of the Act, is not eligible for such a lease.

Upper Mohawk Community Council, 104 IBLA 389 (Oct. 3, 1988)

REGIONAL CORPORATION SELECTIONS

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1) (c)(3) (1982), where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

In the absence of a Master Title Plat or other appropriate land use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the Native selection.



# REGIONAL CORPORATION SELECTIONS--Continued

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982) segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

Basil S. Bolstridge, Elizabeth W. Bolstridge, 90 IBLA 54 (Dec. 10, 1985)

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), and utilized as a basis for declaring mining claims null and void ab initio, where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

Pursuant to 43 CFR 2653.2(d), the filing of a Native regional corporation selection under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), segregates the selected land from all other forms of appropriation under the public land laws, including the mining and mineral leasing laws. The segregative effect of such an application terminates upon final rejection of the application.

When it is not clear whether a regional corporation selection was made only under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, a BLM decision declaring certain mining claims null and void ab initio because notation of the selection on the public land records had segregated the land from mining location may be set aside and the case remanded for a determination of the statutory basis for the selection.

Maurice E. DeBoer, 91 IBLA 317 (Apr. 15, 1986)

# REGIONAL CORPORATION SELECTIONS--Continued

When it is not clear whether a regional corporation selection was made under sec. 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611 (1982), or under the authority of both sec. 12 and sec. 14, 43 U.S.C. § 1613 (1982) of that Act, the case may be remanded for a determination of the statutory basis for the selection.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1611 (1982), thereby rendering mining claims located thereafter null and void ab initio, where neither the Act nor the implementing regulations of the Department provide that the filing of such a selection application segregates the land from other appropriation.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613 (1982), thereby rendering mining claims located thereafter null and void ab initio, in the absence of a master title plat or other land use record entry depicting that the application was filed under that statutory authority.

Nancy Hollingsworth, 92 IBLA 358 (June 30, 1986)

In the absence of a Master Title Plat or other appropriate land-use record entry depicting that a Native regional corporation selection was filed under authority of sec. 14 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613 (1982), which, under authority of 43 CFR 2653.2(d), segregates the selected lands from any other appropriation, it was improper for the Bureau of Land Management to invoke the notation rule as a bar to mining claims located during the pendency of the regional selection.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

REGULATIONS

(See also Administrative Procedure--if included in this Index.)

GENERALLY

Written statements concerning public lands, e.g., proof of improvements of mining claims and proof of posting of notices, need not be sworn statements unless the Secretary in his discretion shall so require.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

While, as a general rule, amendments to regulations or administrative procedures may be applied to a pending appeal where to do so would benefit an appellant, such amended regulations or procedures may not be applied where third-party rights would be adversely affected.

United States v. Richard R. Ballas, 87 IBLA 88 (May 30, 1985)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to remove oil contaminated soil from the well site pursuant to 43 CFR 3162.5-1, and assess liquidated damages for failure to timely comply with that notice by removing all contaminated soil. However, the assessment for noncompliance will be reduced to a one-time, rather than a successive, charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

Willard Pease Oil & Gas Co., 89 IBLA 236 (Oct. 29, 1985)

REGULATIONS--ContinuedGENERALLY--Continued

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with the regulations in 43 CFR Part 3100, applicable lease terms or written order or instruction of an authorized officer is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage to the lessor from the specific incident of noncompliance. Thus, a correctly issued notice of incident of noncompliance will be the basis for the levy of a minimum assessment regardless of good faith effort to abate the condition after issuance.

An assessment levied on the basis of a successive per day amount may be reduced to a one-time charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

Mont Rouge, Inc., 90 IBLA 3 (Nov. 27, 1985)

Approval by the Bureau of Indian Affairs of a tax ordinance passed by an Indian tribe in the exercise of its tribal sovereignty does not constitute an agency rule within the meaning of 5 U.S.C. § 551(4) (1982).

Atchison, Topeka & Santa Fe Railway Co. v. Deputy Area Director, Albuquerque Area Office, Bureau of Indian Affairs, 14 IBLA 46 (Feb. 25, 1986) 93 I.D. 79

An assessment for failure to file production reports in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Somont Oil Co., Inc., 91 IBLA 137 (Mar. 24, 1986)

Yates Petroleum Corp., 91 IBLA 252 (Apr. 9, 1986)

REGULATIONS--ContinuedGENERALLY--Continued

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

David Sohappay, Sr., et al. v. Acting Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 100 (Apr. 4, 1986) 93 I.D. 176

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

Lyco Energy Corp., 92 IBLA 81 (May 27, 1986)

BLM may properly assess liquidated damages pursuant to 43 CFR 3163.3(c) where an oil and gas lessee fails to obtain BLM approval of an application for a permit to drill prior to commencing drilling operations. Where, during BLM's technical and procedural review of an assessment order, 43 CFR 3163.3(c) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Benson-Montin-Greer Drilling Corp., 92 IBLA 92 (May 28, 1986)

An assessment levied pursuant to 43 CFR 3163.3(h) for failure to file a monthly production report in a timely manner may be vacated by this Board, in view of the suspension of that regulation and a change in Department policy that such assessments should automatically be levied.

Burton/Hawks, Inc., 92 IBLA 180 (June 11, 1986)

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

REGULATIONS--ContinuedGENERALLY--Continued

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

An assessment of liquidated damages for failure to file monthly reports of operations in a timely manner pursuant to 43 CFR 3163.3(h) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should automatically be levied.

Apollo Energy Inc., 94 IBLA 154 (Oct. 23, 1986)

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBIA 24 (Oct. 28, 1986) 93 I.D. 409

BLM may properly issue notices of incidents of noncompliance requiring an oil and gas lessee to remove significant amounts of oil deposited in the emergency and disposal pits on a well site, pursuant to 43 CFR 3162.5-1, and assess a penalty for the violations. The Board will affirm a BLM decision based on judgment where the record substantiates the violations and the appellant fails to provide any countervailing evidence to show the decision is in error.

Mapco Oil & Gas Co., 94 IBLA 158 (Oct. 28, 1986)



REGULATIONS--ContinuedGENERALLY--Continued

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation and the change in Department policy that such assessments should be levied automatically.

Mingo Oil Producers, 94 IBLA 384 (Dec. 8, 1986)

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

The Department is obligated to mail a copy of orders, instructions, or notices to the lessee of record under 43 CFR 3162.3 when such documents are served upon the operator designated by the lessee to engage in the actual conduct of operations on the leasehold.

Where 43 CFR 3163.3(a) is amended to reduce assessments to a one-time, rather than a continuing charge, the amended regulation will be applied to the benefit of the affected party, absent any intervening rights which will be affected or countervailing public policy reasons.

Exxon Corp., 95 IBLA 165 (Jan. 13, 1987)

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to have all meters functioning properly, and assess liquidated damages under 43 CFR 3163.3(a) for failure to timely

REGULATIONS--ContinuedGENERALLY--Continued

comply with that notice by calibrating the meters. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to shorten meter hoses in order to prevent the collection of fluid in low spots and assess liquidated damages under 43 CFR 3163.3(a) for failure to comply with that notice. The \$250 assessment for noncompliance is a one-time charge per violation under 43 CFR 3163.3.

BLM may properly require an oil and gas lessee to construct a berm around a tank in which produced water is stored, because BLM is authorized by Departmental regulations to issue instructions or orders relating to the protection of environmental quality. However, such a requirement may not be based upon a condition in the lessee's application for permit to drill requiring the construction of firewalls around tank batteries since a firewall is a wall to retain oil in case of its escape from a tank or to prevent the spread of burning oil.

William Perlman, 96 IBLA 181 (Mar. 18, 1987)

Departmental regulation 43 CFR 3833.0-5(m), a promulgated in Dec. 1982, treats as "timely filed" a mining claim recordation document received by the Bureau of Land Management within 20 days of the statutory deadline for annual mining claim recordation filings if transmitted in an envelope bearing a clearly dated postmark affixed by the United States Postal Service denoting the document was mailed on or before Dec. 30 of the filing year. This regulation took effect Dec. 30, 1982, and in accordance with United States v. Locke, 471 U.S. 84, 102 n.14 (1985), it cannot be applied retroactively.

Lindsay Lee Lemons, 98 IBLA 75 (June 9, 1987)

REGULATIONS--ContinuedGENERALLY--Continued

An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board in view of the suspension of that regulation.

The determination that an assessment for non-compliance with 43 CFR 3103.3(a) should be levied is discretionary, and the levy of an assessment is not automatic. The Board will set aside a BLM technical and procedural review decision that levy of an assessment is automatic and remand the case to allow BLM's exercise of discretion.

Mingo Oil Producers (On Reconsideration), 98 IBLA 133 (June 22, 1987)

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

Exxon Co., U.S.A., et al., 98 IBLA 218 (July 1, 1987)  
94 i.D. 329

When regulations governing late or erroneous reporting of sales and royalty remittance have been amended to allow reduction of charges for such errors to bring them more in line with the additional administrative costs incurred, absent intervening rights or countervailing public policy reasons, the Board will set aside and remand pending cases on appeal if application of the new regulations will benefit the affected parties.

Conoco, Inc., et al., 102 IBLA 230 (May 18, 1988)

REGULATIONS--ContinuedGENERALLY--Continued

BLM may properly issue a notice of incidents of noncompliance requiring a unit operator to file a form designating a successor operator and assess liquidated damages under 43 CFR 3163.3(a) (1984), for failure to comply with that notice.

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

An assessment made pursuant to 43 CFR 3163.3(a) (1986), may be levied where an operator has failed to comply with a written order or instruction of an authorized BLM officer.

Dalport Oil Corp., 104 IBLA 327 (Sept. 21, 1988)

When regulations governing assessments for erroneous reporting of sales and royalty remittance information have been amended to allow lower assessments, the Board may apply those regulations, absent intervening rights or countervailing public policy reasons, where to do so will benefit the appellant.

Forest Oil Corp., 107 IBLA 1 (Jan. 23, 1989)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

The setting of an operation and maintenance rate for an Indian irrigation project, pursuant to 25 U.S.C. § 385 (1982), is rulemaking within the meaning of 5 U.S.C. § 551(4) and (5) (1982).

REGULATIONS--ContinuedGENERALLY--Continued

When it appears that the Bureau of Indian Affairs has not concluded a rulemaking proceeding, the matter will be remanded for completion.

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Sacramento Area Director, Bureau of Indian Affairs, 17 IBIA 141 (June 19, 1989)

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBIA 57 (July 13, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976 shall be covered by the regulations in 43 CFR part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority

REGULATIONS--ContinuedGENERALLY--Continued

when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

Tucson Electric Power Co., 111 IBIA 69 (Sept. 22, 1989)

One who holds an oil and gas lease from the United States is presumed to know the applicable laws and regulations, and the United States cannot be bound or estopped by acts of its officers or agents, if doing so would undermine the correct enforcement of a particular law or regulation. Reliance upon erroneous or incomplete information provided by a BLM employee will not overcome a clear regulatory requirement.

Stephen G. Moore, 111 IBIA 326 (Oct. 31, 1989)

A linear right-of-way for an electric power line is subject to administration pursuant to Departmental regulations published at 43 CFR Subpart 2803. A linear rental rate for an electric power right-of-way was correctly calculated by using a schedule as provided by 43 CFR 2803.1-2(c)(1)(i), even though the rental increased by more than 100 percent over a rental deposit paid, where the amount of increase was phased in pursuant to provision of 43 CFR 2803.102(c)(2)(i).

Keith P. Carpenter, 112 IBIA 101 (Nov. 28, 1989)

APPLICABILITY

The exchange regulations at 43 CFR Part 2200 apply to exchanges made pursuant to 25 U.S.C. § 640d-10 (1982). While those regulations set forth specific information requirements to be included in notices of realty action, a deficient notice does not negate an exchange thereunder, where the person asserting the deficiency had notice of the exchanges, the opportunity



REGULATIONS--ContinuedAPPLICABILITY--Continued

to comment, and was not prejudiced by BLM's failure to provide complete information therein.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

When the only reasonable construction of 43 CFR 3162.3-2(a), as evidenced by prior regulations, the rule-making process, and other regulations, is that "water shut-off" is a subsequent well operation requiring prior approval, an operator under an oil and gas lease cannot rely on the mispunctuation of the regulation as an ambiguity which can excuse failure to obtain approval prior to commencing with water shut-off activities.

Bolack Minerals Co., 93 IBLA 159 (Aug. 12, 1986)

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)

REGULATIONS--ContinuedAPPLICABILITY--Continued

When oil and gas leases are issued pursuant and subject to all regulations of the Secretary "now or hereafter in force," the Secretary is not limited to enforcing only those regulations in effect at the time of lease execution.

Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

BLM may properly reduce the overriding royalty rate for a potassium lease pursuant to regulatory authority previously incorporated into the lease at the time of readjustment, notwithstanding the fact that the rate was originally established prior to the original promulgation of that regulatory authority.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

A regulation requiring an increased rental rate of \$2 per acre for reinstated leases found to be within a KGS which was not in effect at the time a lease was reinstated does not become a provision of the reinstated lease and does not apply to the lease.

Dyco Petroleum Corp., 108 IBLA 366 (May 16, 1989)

BINDING ON THE SECRETARY

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

REGULATIONS--ContinuedBINDING ON THE SECRETARY--Continued

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

FORCE AND EFFECT AS LAW

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department.

Kuugpiik Corp., 85 IBLA 366 (Mar. 26, 1985)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Wisentak, Inc., 87 IBLA 67 (May 28, 1985)

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

Chugach Alaska Corp., The Grouse Creek Corp., 94 IBLA 24 (Sept. 25, 1986)

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

REGULATIONS--ContinuedFORCE AND EFFECT AS LAW--Continued

A Bureau of Land Management instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

Thunderbird Oil Corp., 91 IBLA 195 (Mar. 31, 1986)

BLM Instruction Memoranda and Manual provisions do not generally have the force and effect of law.

Pamela S. Crocker-Davis, 94 IBLA 328 (Nov. 24, 1986)

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 315 (1979).

Shell Offshore, Inc., 96 IBLA 149 (Mar. 17, 1987)  
94 I.D. 69

A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

REGULATIONS--Continued

## FORCE AND EFFECT AS LAW--Continued

A BLM instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

The Joyce Foundation et al., Beard Oil Co., 102 IBLA 342 (June 8, 1988)

Cities Service Oil & Gas Corp., 109 IBLA 322 (June 21, 1989)

A duly promulgated regulation has the force and effect of law and is binding on all Department offices, including the Interior Board of Land Appeals.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

The MMS Payor's Handbook lacks the force and effect of law.

Mesa Petroleum Co., 107 IBLA 184 (Feb. 14, 1989)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement

REGULATIONS--Continued

## FORCE AND EFFECT AS LAW--Continued

of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

Black Butte Coal Co., et al., 109 IBLA 254 (June 16, 1989)

BLM instruction memoranda are merely for internal use by BLM employees. Such documents are not regulations and do not have legal force or effect.

Beard Oil Co., 111 IBLA 191 (Oct. 10, 1989)

## INTERPRETATION

It is axiomatic that the Bureau of Indian Affairs has a responsibility to interpret Federal regulations in carrying out its duties under those regulations.

Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs, 15 IBLA 24 (Oct. 28, 1986) 93 I.D. 409

An assessment for failure to seal appropriate valves levied pursuant to 43 CFR 3163.3(j) may be vacated by the Board in view of the suspension of that regulation by the Bureau of Land Management and the change in Department policy regarding automatic assessments.

Hardy Salt Co., 96 IBLA 39 (Feb. 27, 1987)



REGULATIONS--ContinuedINTERPRETATION--Continued

Where there has been a decrease in Federal lands available for grazing, BLM may impose a proportionate reduction among all the authorized users of a particular allotment as proportionate reduction is consistent with the reduction required under 43 CFR 4110.4-2(a).

B. G. Bunyard v. Bureau of Land Management, 96 IBLA 143 (Mar. 12, 1987)

BLM may not reject a noncompetitive oil and gas lease offer for surveyed acquired land which is not described by acquisition tract number where the pertinent regulation, 43 CFR 3111.2-2(c), does not unambiguously require disclosure of line or case numbers assigned by the Forest Service to the land and the land is otherwise described by aliquot part.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBLA 220 (July 10, 1987) 94 I.D. 353

From the record before the Board at the time of its prior decision, Beard Oil Co., 97 IBLA 66 (1987), it appeared that the practice of the Forest Service was to identify acquired lands in unsurveyed forests by use of "tract" numbers and that "line" or "case" numbers were used to identify lands in surveyed forests. Based on information filed on reconsideration, it appears that the Forest Service practice in fact varies from

REGULATIONS--ContinuedINTERPRETATION--Continued

the above summary. Nevertheless, these variances do not change the Board's opinion regarding the inherent ambiguity in the term "acquisition number" found at 43 CFR 3111.2-2(c). That term does not necessarily include "line" or "case" numbers.

Beard Oil Co. (On Reconsideration), 98 IBLA 299 (July 27, 1987)

The preamble to the 1982 coal lease operations regulations contains no explanation why the Department reached a conclusion concerning the effect of a suspension of operations and production under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, on the 10-year production period in sec. 7(a) of the Act, 30 U.S.C. § 207(a), which is the opposite of the conclusion expressed both in the preamble to the 1979 coal management regulations and in the 1981 proposed coal lease operations regulations. An amendment to 43 CFR 3483.3(b)(1) (1987), to restore the original 1979 interpretation is fully supported by the law.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages

REGULATIONS--ContinuedINTERPRETATION--Continued

against officials of the Bureau of Indian Affairs for their incorrect interpretation of regulations.

Esthervon (Kee) Spencer v. Navajo Area Director, Bureau of Indian Affairs, 17 IBIA 226 (Aug. 17, 1989)

The procedures set forth at 30 CFR 250.70 - 250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. Where neither the relevant regulations nor the Federal Register notice interpreting the regulations requires that an individual applicant who names a partnership as another party in interest include a list of the partners in the partnership with the application, a decision rejecting the application on that basis will be reversed.

Dennis W. Belnap, 112 IBLA 243 (Dec. 28, 1989)

PUBLICATION

The procedures followed by the Bureau of Indian Affairs in determining an individual's Indian blood quantum are rules within the meaning of 5 U.S.C. § 551(4) (1982) and are required by 5 U.S.C. § 552 (1982) to be published in the Federal Register.

Under 5 U.S.C. § 552(a)(1) (1982) and the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), an individual may not be adversely affected by a rule required to be published in the Federal Register that is not so published.

Morgan Underwood, Sr. v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBIA 3 (Jan. 31, 1986)  
93 I.D. 13

REGULATIONS--ContinuedVALIDITY

The Board of Indian Appeals does not have authority to change a duly promulgated regulation of the Department or to declare it invalid.

Harold Jones v. Acting Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 124 (Feb. 27, 1985)

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department.

Kuugpik Corp., 85 IBLA 366 (Mar. 26, 1985)

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

Wisnak, Inc., 87 IBLA 67 (May 28, 1985)

Ahtna, Inc., 87 IBLA 283 (June 25, 1985)

Chugach Alaska Corp., The Grouse Creek Corp., 94 IBLA 24 (Sept. 25, 1986)

Western Slope Carbon, Inc., 98 IBLA 198 (June 29, 1987)

Coastal States Energy Co., 110 IBLA 179 (Aug. 15, 1989)

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

REGULATIONS--ContinuedVALIDITY--Continued

The Board of Indian Appeals does not have authority to declare invalid a duly promulgated Departmental regulation.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

Joint Board of Control for the Flathead, Mission, & Jocko Irrigation Districts v. Area Director, Portland Area Office, Bureau of Indian Affairs, 17 IBIA 65 (Feb. 15, 1989)

Under 43 U.S.C. § 1276(a)(1) (1982), judicial review of the validity of regulations promulgated under the Surface Mining Control and Reclamation Act of 1977 is available only in the United States District Court for the District of Columbia, and the Interior Board of Land Appeals will not entertain arguments based on claims as to the invalidity of regulations promulgated under that Act.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

REGULATIONS--ContinuedVALIDITY--Continued

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

Regulations of the Department implementing 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act are duly promulgated in accordance with the requirements of Exec. Order No. 12291 and the Regulatory Flexibility Act.

GeoResources, Inc., 107 IBLA 311 (Mar. 2, 1989)  
96 I.D. 77

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligation or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

Veola & Aaron Rasmussen, 109 IBLA 106 (June 7, 1989)



REGULATIONS--ContinuedVALIDITY--Continued

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adopted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

REGULATIONS--ContinuedWAIVER

The requirement that a bidder in a competitive oil and gas lease sale must submit one-fifth of the bid amount with his bid is mandatory and will not be waived.

Dolton H. Simmons, 85 IBLA 297 (Mar. 13, 1985)

The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

The decision whether to waive the regulations governing the Indian Housing Improvement Program pursuant to 25 CFR 256.10 and 25 CFR 1.2 is a decision requiring the exercise of discretion.

Frank D. Simmons & Nancy L. Simmons v. Deputy Ass't Secretary--Indian Affairs (Operations) & Stanley W. Strong & Wilma Strong v. Deputy Ass't Secretary--Indian Affairs (Operations), 14 IBLA 243 (Sept. 2, 1986)

Departmental regulation 43 CFR 2653.6(b)(1) (1976) precluded Native groups from receiving land benefits under the Alaska Native Claims Settlement Act if the lands selected by them were in a wildlife refuge. However, Secretarial Order No. 3083 of June 17, 1982, issued pursuant to 43 CFR 2650.0-8 which permits the Secretary to waive any nonstatutory regulation promulgated to implement the Alaska Native Claims Settlement Act, waived the bar to conveyance of refuge lands.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

RENT

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the record indicates full compliance with an earlier decision of this Board involving the same parties and issues, and the only remaining complaint is the fact that no meetings with appellants were held, the appeal will be denied; no such meetings are mandated by 41 CFR 102.7. See 4 CFR 101.8.

Appeal of Henry Mountain Resource Area Employees, II, 6 OHA 80 (Sept. 9, 1985)

A determination establishing quarters rental rates which reflect reasonable rental value consistent with rates charged for comparable private housing in the surrounding community will be affirmed where the record shows the determination was made in accordance with accepted appraisal procedures pursuant to Departmental directives, and the quarters occupants have not established error in the determination.

Appeal of Patrick D. Morrissey, Nu'uese L. Punimata, Samuel L. Paul, & Robert Leonard, 7 OHA 6 (Oct. 2, 1986)

Where appellant fails to establish entitlement to reimbursement for alleged overcharges of rental, his claim for such reimbursement is properly denied.

Appeal of John R. Haugh, 7 OHA 87 (June 29, 1987)

Appeal of Robert W. Jones, 7 OHA 91 (June 29, 1987)

Appeal of Cyrus J. Sokoll, 7 OHA 95 (June 29, 1987)

RENT--Continued

The annual Consumer Price Index adjustment for Government-furnished quarters rental rates should be calculated from the month and year of the regional survey or reappraisal of the private rental market on which the rental rates were based.

Appeal of James E. Brooks, Roger L. Hamman, & Buddy L. Jensen, 7 OHA 124 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

In the Matter of the Rental Rate Appeal of Gary Gissell, 7 OHA 128 (Oct. 16, 1987)

In the Matter of the Rental Rate Appeal of Duncan Hollar, 7 OHA 131 (Oct. 16, 1987)

An appeal from a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

When an issue raised on appeal from a rental rate adjustment for Government-furnished quarters is appropriate for consideration by the agency under 41 CFR 114-52.301(d), the issue will be remanded for such consideration.

A rental rate adjustment for Government-furnished quarters will be upheld when the appellant fails to submit evidence overcoming the agency's showing of regularity in the adjustment.

In the Matter of the Rental Rate Appeal of Robert E. Johnson, 7 OHA 134 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

A rental rate adjustment for Government-furnished quarters that is based on changes in the Consumer Price

RENT--Continued

Index (CPI) is properly deferred 1 year when a rental rate survey is conducted within 6 months before or after the CPI adjustment is scheduled to be made.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

In the Matter of the Rental Rate Appeal of Ronald M. Mackie, 7 OHA 138 (Oct. 16, 1987)

An appeal of a rental rate adjustment for Government-furnished quarters will be dismissed when the relief requested has been granted.

The annual Consumer Price Index adjustment to the rental rate for Government-furnished quarters may not be used as a vehicle to challenge a prior regional rental rate survey.

In making the Consumer Price Index adjustment for Government-furnished quarters, the agency properly bases the adjustment on the table entitled "Percent Change in the U.S. City Average Revised Consumer Price Index for Urban Wage Earners and Clerical Workers, Rent Series," prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

Notification of a rental rate adjustment for Government-furnished quarters is timely if the notice of adjustment is mailed to the tenant at least 30 days prior to implementation of the adjustment.

In the Matter of the Rental Rate Appeal of Randolph L. August, 7 OHA 143 (Oct. 16, 1987)

An administrative agency has authority to correct its own erroneous interpretation of law so long as the departure from prior practice is explained and shown not to be arbitrary or capricious.

In the Matter of the Rental Rate Appeal of Nancy A. Hunter, 7 OHA 148 (Oct. 16, 1987)

RENT--Continued

Rental rate adjustments for Government-furnished quarters will be upheld where appellant fails to submit evidence establishing error in the adjustments.

Appeal of the National Federation of Federal Employees Local #2044, 7 OHA 231 (Aug. 17, 1988)

Rental rate adjustments for Government-furnished quarters will be revised where the record on appeal reveals errors which necessitate such corrective action.

In the Matter of the Rental Rate Appeal of Mr. Marvis V. Averett, 7 OHA 235 (Sept. 1, 1988)

Under 43 CFR 2803.1-2(b), a reduction or waiver of the rental rate for a right-of-way may be granted when the holder of the right-of-way provides without charge, or at a reduced rate, a valuable service to the public.

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications, 107 IBLA 109 (Feb. 2, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupants allege that the rent is unjust, the burden is upon them to prove by



RENT--Continued

positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeals of Employees Living at the Glenwood Ranger Station, 8 OHA 53 (Apr. 18, 1989)

In the Matter of the Quarters Rental Rate Appeals of Michael P. Whitelaw, Linda G. Brown, Joseph L. Finley, Bill Schoenleber, & Richard Arnoux, 8 OHA 74 (June 20, 1989)

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that the rent is unjust, the burden is upon the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

In the Matter of the Quarters Rental Rate Appeal of Mr. James K. Steele, 8 OHA 60 (May 11, 1989)

RES JUDICATA

An appeal contesting appellant's responsibility for repainting doors and jambs under a contract terminated for default is dismissed because the same issues were presented and decided in an earlier decision and affirmed on reconsideration, thereby constituting res judicata.

Appeal of C. G. Norton Co., Inc., IBCA-1823 (Jan. 10, 1985)  
92 I.D. 56

Where an appeal has previously been taken and a final Departmental decision announced, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues, absent compelling legal or equitable reasons for reconsideration.

Village of South Naknek, 85 IBLA 74 (Feb. 11, 1985)

RES JUDICATA--Continued

Where a contractor had the opportunity to include in previous appeals to the Board a challenge to the validity of retainage of funds by the contracting officer, but failed to do so, the Board holds the current appeal, challenging the validity of retainage of funds by the contracting officer under the same contract, to be subject to dismissal under the doctrine of res judicata.

Appeal of C. G. Norton Co., Inc., IBCA-2068 (June 24, 1986)  
93 I.D. 254

Where appellant failed to appeal from a 1982 Departmental decision establishing the date of priority of its noncompetitive oil and gas lease offer and acquiesced in the 1982 decision until 1985, it may not reopen the 1982 decision for the reason that it had failed to understand the consequence of the decision could be adverse.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

RES JUDICATA--Continued

When a mining claim has properly been declared null and void for lack of discovery, a subsequent quitclaim deed from the claimant to a third party conveys nothing as the grantor has no interest which may be conveyed.

Vivian L. Ames et al., 99 IBLA 99 (Sept. 21, 1987)

The Department has long recognized the need to apply the administrative counterpart of the principle of res judicata--the doctrine of administrative finality--to preclude reconsideration of a decision of an agency official when a party, or his predecessor in interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. The rule is subject to the exception that review is available to correct or reverse an erroneous decision upon a showing of compelling legal or equitable reasons such as violations of basic rights or the need to prevent an injustice.

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of compelling equitable or legal reasons why the dismissal should be set aside.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Absent compelling legal or equitable reasons for reconsideration, when an appeal has previously been taken and a final Departmental decision has issued, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues.

Joe N. Johnson, 103 IBLA 5 (June 22, 1988)

RES JUDICATA--Continued

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

The principle of res judicata and its administrative counterpart, the doctrine of administrative finality, precludes reconsideration of a decision of a Departmental official in the absence of compelling legal or equitable reasons when a party or his predecessor-in-interest had an opportunity to obtain review within the Department and took no action. An appeal is properly dismissed where appellant is reapplying for patent 24 years after the prior application was rejected by final Departmental decision.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

Regardless of any deficiency in the readjustment of a potassium lease, the matter will be entitled to repose under the doctrine of administrative finality in the absence of any timely objection by the lessee or the owner of an overriding royalty interest after notice of the readjustment and in the absence of any compelling legal or equitable reasons for further review.

Crescent Porter Hale Foundation, 108 IBLA 288 (Apr. 27, 1989)

RES JUDICATA--Continued

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

RIGHTS-OF-WAY

(See also Indians, Reclamation Lands--if included in this Index.)

## GENERALLY

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental

RIGHTS-OF-WAY--Continued

## GENERALLY--Continued

for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

An appraisal by BLM of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in BLM's appraisal method or fails to show by convincing evidence that charges are excessive. In the absence of a showing of error that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

Glover Communications, Inc., 89 IBLA 276 (Nov. 8, 1985)

Horizon Communications, 91 IBLA 399 (Apr. 30, 1986)

Mesa Broadcasting Co., 94 IBLA 381 (Dec. 5, 1986)

Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578



RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

Whenever the Secretary of the Interior makes any conveyance of land under any of the public land laws, he may reserve a right-of-way for trails within the National Trails System to the extent he deems necessary to carry out the purposes of the National Trails System Act, 16 U.S.C. § 1241 (1982).

The Bureau of Land Management may issue a certificate of allotment subject to a continued right of public access along a segment of the Iditarod National Historic Trail crossing through allotment lands. Such a conveyance is an exercise of the discretion vested in the Secretary pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 - 270-3 (1970).

In the absence of legislative approval of a Native allotment, title to the land in an approved allotment application rests with the United States and does not pass to the Native until the land described therein has been surveyed and a "Native Allotment" issued. Therefore, 25 CFR 169.3, which requires that the Secretary obtain written consent from Indians prior to granting a right-of-way across Indian land, does not apply to approved Native allotment applications prior to survey and issuance of the "Native Allotment."

Edward A. Nickoli, 90 IBLA 273 (Feb. 5, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal unless an appellant is able to show error in the appraisal method or demonstrate by convincing evidence that charges are excessive. The preferred method for determining the fair market value of nonlinear rights-of-way is the comparable lease appraisal.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Jancur, Inc., 93 IBLA 310 (Sept. 11, 1986)

RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 4, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that the charges are excessive. In the absence of a preponderance of evidence that a BLM appraisal is erroneous, such an appraisal generally may be rebutted only by another appraisal.

Miller's Custom Work, Inc., 94 IBLA 261 (Nov. 17, 1986)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

Reo Broadcast Management Co., 98 IBLA 139 (June 22, 1987)

Where BLM issues a right-of-way grant which includes a provision stating that the grant is renewable under certain conditions, the grant does not automatically terminate on its expiration date but is subject to renewal in accordance with the stated terms and conditions, and 43 CFR 2803.6-5(a).

Coors Energy Co., 99 IBLA 37 (Sept. 8, 1987)

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

The Bureau of Land Management may reserve a right-of-way for a segment of the Iditarod Trail in its approval of Native allotment applications. Reserving the right-of-way is an exercise of the discretion vested in the Secretary pursuant to sec. 7(h) of the National Trails System Act, 16 U.S.C. § 1246(h) (1982), and the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970).

In the absence of a dispute as to a material fact, the due process rights of a Native allotment applicant are satisfied by the right to appeal to the Board of

RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

Land Appeals from the reservation of a public use right-of-way for a designated trail under the National Trails System Act, 16 U.S.C. §§ 1241-1251 (1982), in the approval of a Native allotment application.

Clarence Lockwood et al., 95 IBLA 261 (Jan. 27, 1987)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal where an appellant fails to show the rental rate set by BLM is excessive.

Harvey Singleton, 101 IBLA 248 (Feb. 29, 1988)

An appraisal of fair market value for a communication site right-of-way will not be set aside on appeal if an appellant fails to show the rental rate is excessive. Absent a showing that appraisal methods used to set the rental rate are incorrect, a BLM appraisal may, in general, only be rebutted by another appraisal.

Denver & Rio Grande Western Railroad Co., 101 IBLA 252 (Feb. 29, 1988)

Where BLM has approved the assignment of a wind park right-of-way subject to execution of new authorized user agreements with existing authorized users who have the right to use sites within the right-of-way for construction of wind turbine generators, such users have standing to appeal from a subsequent BLM decision issued to the right-of-way holder ordering removal of all generators on the right-of-way.

Storm Master Owners et al., 103 IBLA 162 (July 21, 1988)

RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

A party holding a right-of-way issued under the Act of May 4, 1911, may choose to appeal a rental reappraisal conducted under 43 CFR 2802.1-7(e) (1979), without first pursuing a factual hearing. In such a circumstance, upon obtaining a written waiver of the right to a hearing, BLM may issue a decision imposing the reappraised rental, subject to appeal to the Board of Land Appeals.

Pacific Bell, 104 IBLA 66 (Aug. 25, 1988)

A decision of BLM to issue a right-of-way for a waste water injection well on public land where the mineral estate is held by private parties will be affirmed in accordance with the general rule in American law that once minerals have been removed from the ground the void formerly occupied by the minerals reverts to the surface owner in the absence of any controlling precedent to the contrary.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

Generally, the Board of Land Appeals will uphold a BLM appraisal of a right-of-way unless it can be shown that BLM has failed to apply the proper criteria when calculating the fair market value right-of-way rental or the resulting charges are shown to be excessive. Absent error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Generally, the proper appraisal analysis method for determining the fair market rental value of non-linear rights-of-way is a site-specific analysis of comparable sites with adjustment for variances in the site conditions.

BLM may reduce rental payments for communication site rights-of-way if it determines that the imposition of the fair market value rental would cause an

RIGHTS-OF-WAY--ContinuedGENERALLY--Continued

undue hardship on the right-of-way holder or applicant.

High Country Communications, Inc., 105 IBLA 14 (Oct. 11, 1988)

Under 43 CFR 2803.1-2(b), a reduction or waiver of the rental rate for a right-of-way may be granted when the holder of the right-of-way provides without charge, or at a reduced rate, a valuable service to the public.

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

BLM does not have the authority under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

Phillips Petroleum Co., 105 IBLA 345 (Nov. 17, 1988)

A right-of-way application for road access to desert land entries was properly rejected where the application was not made by the desert land entrymen concerned and the application failed to show road rights-of-way were needed for the affected desert land entries.

Farm Development Corp., 105 IBLA 353 (Nov. 21, 1988)

No violation of the National Environmental Policy Act of 1969 occurs upon BLM's issuance of a right-of-way authorizing construction of an all-weather road through the wintering habitat of an elk herd if the environmental impact statement accompanying this action



RIGHTS-OF-WAY--Continued

## GENERALLY--Continued

adequately describes the impacts of such road, as mitigated by a seasonal road closure adopted as a part of the right-of-way grant.

The Shoshone-Bannock Tribes, The Wilderness Society et al., 108 IBLA 198 (Apr. 17, 1989)

This Board will affirm a BLM decision consenting to directional drilling of an oil and gas well spudded on state lands, drilled through lands described in a Federal lease, and bottomed on private lands when there is a showing that the consent is conditioned upon taking steps to prevent unnecessary or unreasonable interference with the right of the Federal lessee.

M. J. Harvey, Jr., 109 IBLA 31 (May 25, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental. The amount of the

RIGHTS-OF-WAY--Continued

## GENERALLY--Continued

increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way and using the rate scheduled for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

A linear right-of-way for an electric power line is subject to administration pursuant to Departmental regulations published at 43 CFR Subpart 2803. A linear rental rate for an electric power right-of-way was correctly calculated by using a schedule as provided by 43 CFR 2803.1-2(c)(1)(i), even though the rental increased by more than 100 percent over a rental deposit paid, where the amount of increase was phased in pursuant to provision of 43 CFR 2803.102(c)(2)(i).

Keith P. Carpenter, 112 IBLA 101 (Nov. 28, 1989)

## ACT OF JANUARY 27, 1866

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)

96 I.D. 439

RIGHTS-OF-WAY--ContinuedACT OF MARCH 3, 1875

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989) 96 I.D. 439

ACT OF MARCH 3, 1891

BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr. et al., 87 IBLA 236 (June 19, 1985)

ACT OF FEBRUARY 15, 1901

A right-of-way issued under the Act of Feb. 15, 1901, for a dike system is properly revoked as an exercise of the discretion of BLM where the holder fails for over 15 years to develop it, in violation of an express condition in the right-of-way imposing a deadline for completion of development, and where BLM wishes to remove encumbrances on title to the subject lands to allow consummation of a land exchange to protect the habitat of a threatened animal species.

Coachella Valley Water District, 85 IBLA 389 (Mar. 27, 1985)

RIGHTS-OF-WAY--ContinuedACT OF FEBRUARY 15, 1901--Continued

BLM may revoke or modify right-of-way grants issued under the Act of Feb. 15, 1901, where there is just cause to do so. Where the record shows that BLM seeks to modify a grant issued under the Act to permit public access to the public lands described in the grant, and that the public interest would be benefited by the proposed action, BLM's decision to modify the grant will be affirmed on appeal.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

ACT OF MARCH 4, 1911

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

A party holding a right-of-way issued under the Act of May 4, 1911, may choose to appeal a rental reappraisal conducted under 43 CFR 2802.1-7(e) (1979), without first pursuing a factual hearing. In such a circumstance, upon obtaining a written waiver of the right to a hearing, BLM may issue a decision imposing the reappraised rental, subject to appeal to the Board of Land Appeals.

Increased rental charges for a right-of-way issued under the Act of Mar. 4, 1911, and reappraised under 43 CFR 2802.1-7(a) (1979), are imposed "commencing with the ensuing charge year." The ensuing charge year is the rental year which begins following the date of the decision giving notice of the reappraisal and an opportunity for a hearing.

Pacific Bell, 104 IBLA 66 (Aug. 25, 1988)



RIGHTS-OF-WAY--Continued

ACT OF MARCH 4, 1911--Continued

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunications site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142 (June 8, 1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to

RIGHTS-OF-WAY--Continued

ACT OF MARCH 4, 1911--Continued

use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate scheduled for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100 percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

ACT OF FEBRUARY 25, 1920

The Department has discretionary authority to issue a natural gas pipeline right-of-way pursuant to 30 U.S.C. § 185 (1982). A decision to issue a right-of-way in the public interest to facilitate production of gas from Federal oil and gas leases and to dismiss the protest of a competing gas supplier will be affirmed in the absence of a showing of violation of relevant statutes or regulations.

Western Gas Supply Co., 86 IBLA 258 (May 8, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), the Board will set aside



RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

An appraisal of a right-of-way for a "related facility" communications site, granted pursuant to the Act of Feb. 25, 1920, as amended, 30 U.S.C. § 185 (1982), will be upheld on appeal if no error is shown in the appraisal methods used by the Bureau of Land Management and the appellant fails to show by convincing evidence that the charges are excessive.

Northwest Pipeline Corp., 93 IBLA 293 (Sept. 4, 1986)

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease, he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Where, following issuance of a right-of-way grant for a crude oil pipeline across lands embraced by a Federal oil and gas lease, the lessee requests reconsideration of that grant complaining that the grant will interfere with present and future operations on its lease, and the record indicates the lessee was not provided notice prior to right-of-way issuance, its rights were not adequately considered, and certain questions concerning route selection were not adequately addressed by BLM, the BLM decision denying reconsideration will be vacated, the right-of-way grant set aside, and the case remanded.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the original rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

Under subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), all right, title, and interest to tentatively approved land was legislatively conveyed to the State of Alaska, effective from the date of tentative approval. BLM's decision not to include a reservation for the Alaska natural gas transportation system right-of-way grant in a patent to tentatively approved lands will be affirmed, where the right-of-way was granted Dec. 1, 1980, and the lands were tentatively

RIGHTS-OF-WAY--Continued

ACT OF FEBRUARY 25, 1920--Continued

approved Oct. 16, 1963. The applicant has no valid existing rights to such right-of-way through those lands under sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c)(1) (1982), since the right-of-way was not issued prior to the tentative approval.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

APPLICATIONS

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on



RIGHTS-OF-WAY--Continued

## APPLICATIONS--Continued

a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985)  
92 I.D. 58

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc., Springfield  
Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be

RIGHTS-OF-WAY--Continued

## APPLICATIONS--Continued

rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

In deciding whether to grant a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, which is planned as part of a larger project involving the treatment and exporting of that wastewater for agricultural reuse after storage, which project is subject to funding or authorization by other Federal agencies, BLM is only responsible for assessing the environmental impact of the right-of-way grant.

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, Jr., 94 IBLA 138 (Oct. 21, 1986)



RIGHTS-OF-WAY--ContinuedAPPLICATIONS--Continued

Use of public lands for the purpose of conducting military maneuvers is not properly authorized pursuant to the grant of a right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982).

Dept. of the Army, 95 IBLA 52 (Dec. 19, 1986)

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

Rejection of an application for a right-of-way for road access across Federal lands not under lease to a drill site on a Federal oil and gas lease may be reasonable where it is filed too close to the expiration date of the lease (after which the right-of-way would be meaningless) to allow processing consistent with the Department's statutory obligations under the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976. However, where an application for suspension of operations is filed prior to lease expiration to obtain time for approval of the right-of-way, rejection of the right-of-way application will be set aside as premature

RIGHTS-OF-WAY--ContinuedAPPLICATIONS--Continued

in the absence of an adjudication of the request for suspension.

John March, 98 IBLA 143 (June 22, 1987)

Under the regulations governing right-of-way applications, the authorized officer may require the applicant to submit additional information as he deems necessary. Also, the authorized officer is required to issue a deficiency notice when he finds the information supplied is incomplete or not in conformance with the law. However, the authorized officer is not required to request further information prior to issuance of a deficiency notice.

A right-of-way application for a wind farm is a request for a non-linear right-of-way, and, therefore, processing fee requirements are governed by 43 CFR 2803.1-1(a)(3)(ii). Where BLM requests submission of additional fees to cover processing costs for such a non-linear right-of-way, and the applicant fails to pay such fees, a BLM decision rejecting the application for failure to make additional payment will be upheld on appeal.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

Where BLM determines, for the purpose of cost reimbursement, that under 43 CFR 2883.1-1(a)(3), an application for a temporary use permit for repair work on a right-of-way falls under Category IV, its decision will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Northwest Pipeline Corp., 99 IBLA 364 (Nov. 3, 1987)

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect

RIGHTS-OF-WAY--ContinuedAPPLICATIONS--Continued

regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

A decision to reject a right-of-way application for a wind-turbine generating facility will be affirmed where the record supports a finding that the right-of-way would be inconsistent with the purpose for which the tract of public land at issue is being managed.

Kenneth W. Bosley, 101 IBLA 52 (Jan. 26, 1988)

When various right-of-way grantees who utilize helicopters to access a communication site object to the grant of a subsequent right-of-way to another applicant on the ground that the right-of-way will interfere with helicopter access, and the record establishes that there has been no authorization to use a helicopter to access the site, the casefiles will be remanded to BLM so that it may take affirmative action to either prohibit or formally permit such use.

KLAS, Inc., et al., 101 IBLA 206 (Feb. 23, 1988)

A right-of-way application for road access to desert land entries was properly rejected where the application was not made by the desert land entrymen concerned and the application failed to show road rights-of-way were needed for the affected desert land entries.

Farm Development Corp., 105 IBLA 353 (Nov. 21, 1988)

Nothing in the general mining laws invests individuals who reside on patented mineral land with a right of access across Federal land, when it appears from the record that the land is not subject to mineral exploration and development.

When individuals who gain access to private property by means of a timber road across Federal

RIGHTS-OF-WAY--ContinuedAPPLICATIONS--Continued

lands fail to maintain the road so as to prevent damage to the road and the surrounding environment, BLM properly terminates their use of the road under the "casual use" regulations, 43 CFR 2800.0-5(m). Where private landowners' use of a BLM road does not qualify as casual use under the regulations, they must obtain a right-of-way grant pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), in order to continue to use the road.

Bob Strickler et al., 106 IBLA 1 (Nov. 30, 1988)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

Under 43 CFR 2803.1-2(b)(1)(i), no rental shall be collected from a local government or agency or instrumentality thereof, except municipal utilities and cooperatives whose principal source of revenue is customer charges. Where BLM issues a decision requiring rental for a sewer line right-of-way, and on appeal the grantee claims the benefit of 43 CFR 2803.1-2(b)(1)(i) on the basis that it is a "local government," and the record does not disclose whether the grantee qualifies, the Board will set aside the decision and remand the case for BLM to determine the applicability of the regulation.

Snyderville Basin Sewer Improvement District, 111 IBLA 235 (Oct. 23, 1989)

RIGHTS-OF-WAY--ContinuedAPPRAISALS

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where the record indicates BLM did not consider whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

BLM properly requires the municipal holder of a right-of-way for a water treatment plant to pay fair market rental value in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentalality of a local government and the principal source of the revenue attributable to the service is customer charges.

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

The municipal holder of a right-of-way for a water treatment plant must pay fair market rental in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), if the municipal holder is an instrumentality of a local government and the principal source of the revenue attributable to the service is customer charges.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

A BLM decision fixing the annual rental for a linear right-of-way issued pursuant to the Mineral Leasing Act, 30 U.S.C. § 185 (1982), in an amount equal to the original rental or last uncontested fee is properly affirmed where the right-of-way was originally issued in 1979 and its rental has become subject to adjustment pursuant to 43 CFR 2803.1-2(d). Said rental in the amount of the original rental or last uncontested fee is applicable, pursuant to Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), during an interim period while BLM prepares new regulations establishing an approved method for appraising linear rights-of-way.

Northwest Central Pipeline Corp., 97 IBLA 327 (May 21, 1987)

An appraisal of a reservoir right-of-way granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

Sec. 504(g) of the Federal Land Policy and Management Act of 1976 and 43 CFR 2803.1-2(c)(3), permit BLM to charge less than the fair market rental value if the



RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

right-of-way holder provides a valuable benefit to the public or to the programs of the Secretary without charge or at reduced rates.

Delbert Jones, 100 IBLA 289 (Dec. 16, 1987)

An appraisal of a right-of-way will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market value of a right-of-way rental or the appellant shows that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Increased rental charges for a right-of-way issued under the Act of Mar. 4, 1911, and reappraised under 43 CFR 2802.1-7(a) (1979), are imposed "commencing with the ensuing charge year." The ensuing charge year is the rental year which begins following the date of the decision giving notice of the reappraisal and an opportunity for a hearing.

Pacific Bell, 104 IBLA 66 (Aug. 25, 1988)

An appraisal of the fair market value of a right-of-way will not be set aside on appeal if appellant fails to show error in the appraisal methods used or fails to show by convincing evidence that charges are excessive. In the absence of a showing that the appraisal methods used by BLM are incorrect, an appraisal may be rebutted only by another appraisal.

An application for a reduction in the fair market rental value charged for a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982), on the ground of hardship, pursuant to the regulation at 43 CFR 2803.1-2(b)(2)(iv), 52 FR 25819 (July 8, 1987), may be adjudicated for an existing right-of-way where the holder has tendered the estimated advance rental deposit demanded by BLM.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

Generally, the proper appraisal method for determining the fair market value of nonlinear rights-of-way, including communications sites, is the comparable lease method of appraisal. An appraisal may be set aside and the case remanded where the record on appeal shows insufficient analysis of the other leases considered in the appraisal to verify their comparability with the right-of-way appraised.

Communications Enterprises, Inc., 105 IBLA 132 (Oct. 26, 1988)

Tortoise Communications, 105 IBLA 193 (Nov. 2, 1988)

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Where BLM adjusts the annual rental for a telecommunications site right-of-way based on the comparable lease method of valuation and, following an informal hearing on the appraisal, abandons the appraisal in favor of a market data study of telecommunication site annual rental values, the decision establishing the rental on the basis of the market data study will be vacated and remanded for reappraisal, where the market study did not fully identify the lease transactions relied upon and BLM provided no analysis of how the right-of-way being appraised compared to any particular information in the market study.

Mountain States Telephone & Telegraph Co., 107 IBLA 82 (Jan. 31, 1989)

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

Where BLM has set the annual rental charges for a communications site right-of-way based on an appraisal of the fair market rental value of that site which failed, without adequate justification, to consider a comparable lease of arguable significance, the Board will set aside the decision setting the rental charges and remand for a reappraisal and any necessary recalculation of such charges.

Richard Boulais, dba Private Line Communications,  
107 IBLA 109 (Feb. 2, 1989)

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

When private property is taken by the United States just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute  
Reservation v. Area Director, Sacramento Area Office,  
Bureau of Indian Affairs, 17 IBLA 78 (Feb. 22, 1989)

An appraisal of the fair market rental value of a right-of-way for a communications site may be set aside and remanded where the appraisal report provides insufficient data on leases compared and insufficient analysis of the differences and similarities between the comparable leases and the subject lease to support the appraisal.

Mountain States Telephone & Telegraph Co., 109 IBLA 142  
(June 8, 1989)

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14,  
1989)

The regulations at 43 CFR 2801.4 provide that a right-of-way grant issued on or before Oct. 21, 1976, shall be covered by the regulations in 43 CFR Part 2800. In turn, 43 CFR 2803.1-2(c)(1) provides, with limited exceptions, that an annual rental payment must be submitted in accordance with the per-acre rental schedule set out therein. A proposed per-acre rental schedule by state, county, and type of linear right-of-way use was published in the Federal Register, and comments were sought. The final rules, also published in the Federal Register, set out a county-by-county rental schedule. Rules and regulations reasonably adapted to the administration of a congressional act, not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such rules and regulations invalid. There being no showing that the Department exceeded its statutory authority when setting the rental rate, this Board is obligated to accept the use of those rates. BLM's decision to use rate zones and its use of the rental schedule as the basis for calculating the rental obligations were proper.

When setting the yearly rentals for existing linear rights-of-way not previously subject to the rental schedule set out at 43 CFR 2803.1-2(c)(1)(i), the regulatory provisions found at 43 CFR 2803.1-2(c)(2)(ii) require a rental adjustment if the new rental exceeds \$100 and is more than a 100-percent increase over the current rental. The amount of the increase in excess of the 100-percent increase must be phased in by equal increments, plus the annual adjustment, over a 3-year period. A BLM decision establishing a new rental rate for a linear right-of-way, and using the rate schedule for the first time, will be set aside and remanded if BLM fails to phase in the amount of the rental increase in excess of 100

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

percent of the current rental pursuant to 43 CFR 2803.1-2(c)(2)(ii).

Tucson Electric Power Co., 111 IBLA 69 (Sept. 22, 1989)

Under 43 CFR 2803.1-2(c)(1)(v), the authorized officer is required to use the fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i) in establishing the rental for a linear right-of-way, unless the authorized officer determines that a substantial segment or area within the right-of-way exceeds the zone(s) value by a factor of 10 and in the judgment of the authorized officer, the expected valuation is sufficient to warrant a separate appraisal. When BLM calculates the rental for a linear right-of-way on the basis of an appraisal, the record should include the determination required by 43 CFR 2803.1-2(c)(1)(i).

Snyderville Basin Sewer Improvement District, 111 IBLA 235 (Oct. 23, 1989)

Where a BLM determination of the fair market rental value of a communications site right-of-way is based on a market study appraisal which does not comport with a proper application of the comparable lease method of appraisal and fails to provide data and analysis sufficient to determine the comparability of the right-of-way and private leases for similar communications use, the Board will vacate the value determination and remand the case for reappraisal.

Joyce Communications, Inc., 111 IBLA 255 (Oct. 25, 1989)

Under 43 CFR 2803.1-2(c)(1)(v), the authorized officer is required to use the fee schedule set forth at 43 CFR 2803.1-2(c)(1)(i) in establishing the rental for a linear right-of-way, unless the authorized officer determines that a substantial segment or area within the right-of-way exceeds the zone(s) value by a factor of 10 and in the judgment of the authorized officer, the expected valuation is sufficient to warrant a separate appraisal. When BLM makes the determination required by the regulation, it may

RIGHTS-OF-WAY--ContinuedAPPRAISALS--Continued

properly calculate the rental for a linear right-of-way on the basis of an appraisal.

Where a right-of-way holder charges that the fair market rental value determined by BLM is in error, but shows no error in BLM's appraisal method and provides no evidence to establish that BLM's appraisal is excessive, the Board will affirm BLM's determination.

Great Co., 112 IBLA 239 (Dec. 21, 1989)

CANCELLATION

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)

A right-of-way issued under the Act of Feb. 15, 1901, for a dike system is properly revoked as an exercise of the discretion of BLM where the holder fails for over 15 years to develop it, in violation of an express condition in the right-of-way imposing a deadline for completion of development, and where BLM wishes to remove encumbrances on title to the subject lands to allow consummation of a land exchange to protect the habitat of a threatened animal species.

Coachella Valley Water District, 85 IBLA 389 (Mar. 27, 1985)



RIGHTS-OF-WAY--ContinuedCANCELLATION--Continued

BLM may properly cancel a right-of-way granted pursuant to the Act of Mar. 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

James L. Morrison Sr. et al., 87 IBLA 236 (June 19, 1985)

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

BLM properly holds a communications site right-of-way grant for termination where the holder failed to pay the annual rental charges for the first and second years of the grant within 30 days following notification of BLM's determination of the fair market value of the grant for those years.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

Under 43 CFR 2803.1-4, BLM is authorized to require the holder of a right-of-way grant to furnish a bond or other security satisfactory to BLM where necessary to secure compliance with the obligations imposed by the grant and applicable laws and regulations. Where the right-of-way holders have failed to comply with the restrictions of the grant (1) by constructing (without prior notice to or approval by BLM) a pipeline and catchment structure that did not conform to approved specifications and which is located

RIGHTS-OF-WAY--ContinuedCANCELLATION--Continued

in trespass outside the boundaries of the right-of-way, (2) by creating excessive surface disturbance both on and off the lands covered by the right-of-way, and (3) by disturbing a stream bed in violation of governing laws and regulations, and where it reasonably appears from statements by the holders that they do not intend to take corrective action, BLM properly demands that a performance bond be posted. Under 43 CFR 2803.4(b), BLM, following issuance of notice that the bond is due, may terminate the right-of-way grant if the bond is not posted as directed.

Frank A. Keele, William C. Taylor, Van Taylor, 107 IBLA 296 (Mar. 1, 1989)

When an easement deed for a right-of-way over tribal land authorizes the grantee to assign its interest to another party, and the assignee is using the right-of-way in accordance with the terms of the easement deed, the right-of-way may not be cancelled for non-use or abandonment.

City of Elko, Nevada v. Acting Phoenix Area Director, Bureau of Indian Affairs, 18 IBIA 54 (Nov. 14, 1989)

CONDITIONS AND LIMITATIONS

In granting a right-of-way for a storage reservoir for secondary-treated wastewater and a water diversion pipeline, BLM may rely on environmental documentation prepared by other agencies to make a convincing case that no significant environmental impact will result, where BLM conducts an independent review of the assessments by the agencies of the environmental impact of the project, and the assessments identify relevant areas of environmental concern, including the threat of groundwater contamination and inundation of cultural resources. However, where BLM fails to incorporate into the grant those measures deemed necessary to mitigate any significant environmental impact, the Board will, rather than set aside the grant, remand the case to BLM for inclusion of appropriate stipulations.

Sierra Club, Inc., et al., 92 IBLA 290 (June 26, 1986)

RIGHTS-OF-WAY--Continued

## CONDITIONS AND LIMITATIONS--Continued

In regulations set forth at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land.

Under 25 CFR 169.19, prior written tribal consent is required for the renewal of a right-of-way across tribal lands.

Northern Natural Gas v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 15 IBIA 124 (Mar. 2, 1987)

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

Carl H. Alber, Jr., 100 IBLA 257 (Dec. 9, 1987)

A decision by BLM ordering the holder of a wind park right-of-way to remove or have removed from the right-of-way all wind turbine generators on the basis that none of the retrofit report proposals submitted met the criteria of positive feasibility for long-term productivity will be vacated where the evidence relied upon by BLM does not support the action taken.

Storm Master Owners et al., 103 IBLA 162 (July 21, 1988)

BLM may revoke or modify right-of-way grants issued under the Act of Feb. 15, 1901, where there is just cause to do so. Where the record shows that BLM seeks to modify a grant issued under the Act to permit public access to the public lands described in the grant, and that the public interest would be benefited by the proposed action, BLM's decision to modify the grant will be affirmed on appeal.

BLM may require the holder of a right-of-way grant for a municipal water-supply reservoir issued

RIGHTS-OF-WAY--Continued

## CONDITIONS AND LIMITATIONS--Continued

under the Federal Land Policy and Management Act of 1976 to open all parts of the reservoir for limited public access where the grant was conditioned on BLM's right to review at 5-year intervals whether the limited public access should be permitted on the reservoir provided that so doing was in the public interest and would not unduly burden the use of the land as a water-supply reservoir.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

Where issuance of a right-of-way for a dam and reservoir in an area likely to contain archaeological artifacts is conditioned upon a stipulation requiring the holder to assume the responsibility for testing and/or mitigation of impacts to sites discovered as a result of operations pursuant to the right-of-way, a decision requiring compliance with that stipulation will be affirmed on appeal.

A stipulation imposing liability on a right-of-way holder for mitigation of impacts to cultural resources discovered as a result of operations under the right-of-way will be enforced according to its terms. Where 90 percent of the land embraced in a cultural resources site discovered as a result of operations under a right-of-way is situated on public land and/or private land outside the boundary of the right-of-way, the liability of the holder for mitigation expenses will be upheld for portions of the site within the right-of-way in the absence of language imposing liability for sites outside the right-of-way grant.

Water Users Ass'n No. 1, 108 IBLA 166 (Apr. 11, 1989)

## FEDERAL HIGHWAY ACT

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA) 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore, a private contest filed by the State of Alaska against such a Native allotment based on the State's claim to certain lands within the allotment as existing Federal Highway Act

RIGHTS-OF-WAY--ContinuedFEDERAL HIGHWAY ACT--Continued

rights-of-way, which contest is filed more than 180 days following enactment of ANILCA, must be dismissed.

Sec. 905(e) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(e) (1982), provides that prior to issuing an allotment certificate, the Secretary will identify and adjudicate designated record entries or applications for title claiming lands described in the allotment application. A Federal Highway Act grant is neither a record entry nor an application for title within the meaning of that section.

State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (Dec. 4, 1985)

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way.

Kenneth L. Ingram et al., 96 IBLA 290 (Mar. 31, 1987)

Mining claims located on lands subject to a valid, ongoing, and pre-existing material-site right-of-way granted to the State of Nevada pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982), are null and void ab initio.

Russell Avery & Douglas E. Noland, 99 IBLA 22 (Aug. 25, 1987)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on

RIGHTS-OF-WAY--ContinuedFEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

a reasoned analysis of the factors involved, made with due regard for the public interest.

High Summit Oil & Gas, Inc., 84 IBLA 359 (Jan. 24, 1985) 92 I.D. 58

A Bureau of Land Management decision rejecting a right-of-way application for a road filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest.

Dwane Thompson, 88 IBLA 31 (July 9, 1985)

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

Blue Mesa Road Ass'n, Roy Romer, Walter Burke, 89 IBLA 120 (Sept. 30, 1985)

Sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), authorizes the Secretary of the Interior to charge, less than fair market value for right-of-way rental. However, a for profit business whose principal source of revenue results from subleasing communication facilities is not entitled to a reduction or waiver of a rental fee based on fair market value merely by providing a service to



RIGHTS-OF-WAY--Continued

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Government agencies or representatives of Government agencies.

Jim Doering, 91 IBLA 131 (Mar. 20, 1986)

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management to prohibit wind energy development within the Table Mountain Area of Critical Environmental Concern will be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, with due regard for the public interest. An application for a right-of-way for a wind energy project will be rejected where lands described therein are not available for development.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

Where a rental rate for a linear right-of-way is not established in accordance with a BLM Instruction Memorandum, the BLM decision will be reversed and remanded.

A. Keith Barben, 94 IBLA 67 (Sept. 29, 1986)

A Bureau of Land Management decision rejecting a road right-of-way application filed pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), will be affirmed when the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Edward J. Connolly, Jr., 94 IBLA 138 (Oct. 21, 1986)

RIGHTS-OF-WAY--Continued

## FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982), an application for a right-of-way may be rejected by the Secretary or his duly authorized representative in his discretion. Where the decision is based on a reasoned analysis of factors involved, with due regard for the public interest, a BLM decision to reject an application will be affirmed.

Dale Ludington, 94 IBLA 167 (Oct. 28, 1986)

The Alaska Native Claims Settlement Act requires the Secretary of the Interior to manage lands selected by a Native village corporation in accordance with applicable laws and regulations. The Secretary may issue rights-of-way over upon, under, or through such land pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1982).

BLM's decision granting a right-of-way for water treatment facilities will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no sufficient reason to disturb the decision is shown. Under 43 CFR 2650.1(a), the decision to issue such a right-of-way on land selected by a Native village corporation under the Alaska Native Claims Settlement Act must consider the views of the village; if the village does not consent to the right-of-way, the Department must balance the public interest against the interests of the village, issuing the right-of-way only if the public interest outweighs the objections of the village.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761-1771 (1982), requires that a right-of-way application be approved prior to transporting water across public land for any mining purpose. Approval of a right-of-way application is within the discretion of the Secretary of the Interior. A decision by the Secretary's delegate, made in

RIGHTS-OF-WAY--ContinuedFEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

exercise of such discretion, will be affirmed in the absence of sufficient reason to disturb it.

Desert Survivors, 96 IBLA 193 (Mar. 19, 1987)

Where a right-of-way applicant was charged \$375 for 5-years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of \$25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the \$375 rate must be vacated.

Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the case file remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

Dean R. Karlberg, 98 IBLA 237 (July 6, 1987)

A telephone microwave repeater station financed pursuant to the Rural Electrification Act, 7 U.S.C. § 901 (1982), is a facility for which a right-of-way shall be granted without rental fees, as provided by the Act of May 25, 1984, P.L. 98-300, 98 Stat. 215, amending 43 U.S.C. § 1764(g) (Supp. III 1985).

South Central Utah Telephone Ass'n, Inc., 98 IBLA 275 (July 17, 1987)

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant, issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

Aztec Energy Corp., 98 IBLA 372 (Aug. 3, 1987)

RIGHTS-OF-WAY--ContinuedFEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

A decision of BLM to issue a right-of-way for a waste water injection well on public land where the mineral estate is held by private parties will be affirmed in accordance with the general rule in American law that once minerals have been removed from the ground the void formerly occupied by the minerals reverts to the surface owner in the absence of any controlling precedent to the contrary.

BLM's decision to require the posting of a bond by the holder of a right-of-way will be upheld when appellant fails to demonstrate that BLM's decision is in error.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

BLM does not have the authority under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

Phillips Petroleum Co., 105 IBLA 345 (Nov. 17, 1988)

A right-of-way application for road access to desert land entries was properly rejected where the application was not made by the desert land entrymen concerned and the application failed to show road rights-of-way were needed for the affected desert land entries.

Farm Development Corp., 105 IBLA 353 (Nov. 21, 1988)

Approval of an application for a communication site right-of-way pursuant to sec. 501(a)(5) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a)(5) (1982), is discretionary with the Department. A decision rejecting a single-user right-of-way application will be affirmed on appeal where it is predicated on the public interest in limiting authorized sites to multi-user facilities and

RIGHTS-OF-WAY--ContinuedFEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

the evidence fails to establish a multi-user site would not adequately serve the applicant's needs.

Glenwood Mobile Radio Co., 106 IBLA 39 (Dec. 7, 1988)

BLM may require the holder of a right-of-way grant for a municipal water-supply reservoir issued under the Federal Land Policy and Management Act of 1976 to open all parts of the reservoir for limited public access where the grant was conditioned on BLM's right to review at 5-year intervals whether the limited public access should be permitted on the reservoir provided that so doing was in the public interest and would not unduly burden the use of the land as a water-supply reservoir.

Ute Water Conservancy District, 106 IBLA 346 (Jan. 12, 1989)

Under 43 CFR 2803.1-4, BLM is authorized to require the holder of a right-of-way grant to furnish a bond or other security satisfactory to BLM where necessary to secure compliance with the obligations imposed by the grant and applicable laws and regulations. Where the right-of-way holders have failed to comply with the restrictions of the grant (1) by constructing (without prior notice to or approval by BLM) a pipeline and catchment structure that did not conform to approved specifications and which is located in trespass outside the boundaries of the right-of-way, (2) by creating excessive surface disturbance both on and off the lands covered by the right-of-way, and (3) by disturbing a stream bed in violation of governing laws and regulations, and where it reasonably appears from statements by the holders that they do not intend to take corrective action, BLM properly demands that a performance bond be posted. Under 43 CFR 2803.4(b), BLM, following issuance of notice that the bond is due, may terminate the right-of-way grant if the bond is not posted as directed.

Frank A. Keele, William C. Taylor, Van Taylor, 107 IBLA 296 (Mar. 1, 1989)

RIGHTS-OF-WAY--ContinuedFEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

Metropolitan Water District of Southern California, 109 IBLA 327 (June 22, 1989)

Under 43 CFR 2803.1-2(b)(1)(i), no rental shall be collected from a local government or agency or instrumentality thereof, except municipal utilities and cooperatives whose principal source of revenue is customer charges. Where BLM issues a decision requiring rental for a sewer line right-of-way, and on appeal the grantee claims the benefit of 43 CFR 2803.1-2(b)(1)(i) on the basis that it is a "local government," and the record does not disclose whether the grantee qualifies, the Board will set aside the decision and remand the case for BLM to determine the applicability of the regulation.

Snyderville Basin Sewer Improvement District, 111 IBLA 235 (Oct. 23, 1989)

NATURE OF INTEREST GRANTED

A right-of-way for an electric transmission line issued pursuant to the Act of Mar. 4, 1911, over lands to which, at the time of issuance, an Alaska Native had an inchoate right through use and occupancy, cannot be defeated by subsequent determination of entitlement to an allotment for such lands, and the allotment must be made subject to the right-of-way. A decision holding such a right-of-way null and void must be reversed.

Golden Valley Electric Ass'n, 85 IBLA 363 (Mar. 25, 1985)



RIGHTS-OF-WAY--Continued

## NATURE OF INTEREST GRANTED--Continued

A right-of-way for an electric transmission line issued, subject to valid existing rights, pursuant to the Act of Mar. 4, 1911, over lands in the open and notorious possession of an Alaska Native cannot diminish the statutory preference right to a Native allotment. Although the preference right is inchoate prior to completion of the required period of qualifying use and occupancy and the filing of a timely application, when the preference right is vested it takes precedence over intervening applications filed subsequent to the commencement of use and occupancy by the Native and the right-of-way will be ineffective to authorize use of lands in the allotment after vesting of the preference right.

Golden Valley Electric Ass'n (On Reconsideration), 98 IBLA 203 (June 29, 1987)

A decision of BLM to issue a right-of-way for a waste water injection well on public land where the mineral estate is held by private parties will be affirmed in accordance with the general rule in American law that once minerals have been removed from the ground the void formerly occupied by the minerals reverts to the surface owner in the absence of any controlling precedent to the contrary.

Mallon Oil Co., 104 IBLA 145 (Sept. 2, 1988)

BLM does not have the authority under sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

Phillips Petroleum Co., 105 IBLA 345 (Nov. 17, 1988)

RIGHTS-OF-WAY--Continued

## NATURE OF INTEREST GRANTED--Continued

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, Ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way, M-36964 (Jan. 5, 1989)

96 I.D. 439

Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

State of Alaska, Golden Valley Electric Ass'n, 110 IBLA 224 (Aug. 24, 1989)

Where a Native initiates use and occupancy of certain lands in 1937, but prior to the filing of an allotment application, a conflicting hot springs lease is issued and a public access trail was used to the hot springs, the later filing of the allotment application vests the inchoate preference right arising from the prior use and occupancy. That right relates back to the initiation of the use and occupancy, thereby taking

RIGHTS-OF-WAY--Continued

## NATURE OF INTEREST GRANTED--Continued

precedence over the intervening hot springs lease and the use of the public access trail.

James E. Dawson, 111 IBLA 139 (Sept. 29, 1989)

## OIL AND GAS PIPELINES

The Department has discretionary authority to issue a natural gas pipeline right-of-way pursuant to 30 U.S.C. § 185 (1982). A decision to issue a right-of-way in the public interest to facilitate production of gas from Federal oil and gas leases and to dismiss the protest of a competing gas supplier will be affirmed in the absence of a showing of violation of relevant statutes or regulations.

Western Gas Supply Co., 86 IBLA 258 (May 8, 1985)

Where the Bureau of Land Management proposes to resolve the conflicts and inconsistencies in its appraisal method used to determine fair market rental values for natural gas pipeline rights-of-way, granted pursuant to the Act of Feb. 25, 1920 as amended, 30 U.S.C. § 185 (1982), the Board will set aside decisions based on the going rate method of appraisal, and remand such questions to the Bureau of Land Management for further action consistent with the result of BLM's analysis.

An oil and gas lease issued pursuant to the Act of Feb. 25, 1920, 30 U.S.C. § 181 (1982), grants to the lessee no rights in lands outside the subdivisions described in the lease. Off-lease facilities on Federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease commercial facilities may be constructed only after an appropriate right-of-way has been granted. Sec. 28 of the Act, 30 U.S.C. § 185 (1982), does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill. However, where on-lease gathering facilities are constructed by an individual who is neither the lessee nor the operator, such activities constitute "commercial operations" and

RIGHTS-OF-WAY--Continued

## OIL AND GAS PIPELINES--Continued

are permissible only after obtaining a right-of-way under sec. 28.

No authority exists in either sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), or in the regulations issued thereunder to support a request that BLM refrain from collecting 6 years of back use charges for the unauthorized use of rights-of-way on the Federal lands.

BLM's right to reappraise every 5 years a right-of-way issued pursuant to sec. 28 of the Act of Feb. 25, 1920, 30 U.S.C. § 185 (1982), is but one factor that BLM has considered in arriving at an adjusted going rate for BLM rights-of-way. BLM's adjusted going rate is calculated by reducing by 30 percent the industry going rate for rights-of-way on private lands.

Gas Co. of New Mexico, 88 IBLA 240 (Sept. 3, 1985)

A decision increasing the annual rental fee for a natural gas pipeline compressor station will be set aside and remanded where there is insufficient information to illustrate how BLM arrived at its new annual fair market rental value.

Colorado Interstate Gas Co., 94 IBLA 306 (Nov. 18, 1986)

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Where, following issuance of a right-of-way grant for a crude oil pipeline across lands embraced by a Federal oil and gas lease, the lessee requests reconsideration of that grant complaining that the grant will interfere with present and future operations on its lease, and the record indicates the lessee was not provided notice prior to right-of-way issuance, its rights were not adequately considered, and certain



RIGHTS-OF-WAY--Continued

## OIL AND GAS PIPELINES--Continued

questions concerning route selection were not adequately addressed by BLM, the BLM decision denying reconsideration will be vacated, the right-of-way grant set aside, and the case remanded.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide gas stream separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

Exxon Corp., 97 IBLA 45 (Apr. 23, 1987) 94 I.D. 139

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows

RIGHTS-OF-WAY--Continued

## OIL AND GAS PIPELINES--Continued

that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

BLM may properly grant a right-of-way for a crude oil pipeline across a Federal oil and gas lease where BLM has adequately considered all relevant factors, including various alternative routes proposed by the lessee, and determined that only the selected route does not cross protected wetlands; that the selected route is consistent with BLM policy favoring the issuance of rights-of-way adjacent to existing facilities; and that the selected route does not, in any material respect, interfere with or diminish the rights granted to the lessee under its lease.

Arnell Oil Co., 110 IBLA 80 (July 26, 1989)

A BLM appraisal of a right-of-way for a compressor station will be affirmed on appeal where the right-of-way holder has not demonstrated that it was error for BLM to use a market survey of comparable transactions involving the issuance of private rights-of-way rather



RIGHTS-OF-WAY--ContinuedOIL AND GAS PIPELINES--Continued

than the fee schedule for linear rights-of-way or the "before and after" appraisal method.

Colorado Interstate Gas Co., 110 IBLA 171 (Aug. 14, 1989)

## REVISED STATUTES SEC. 2477

Although available information suggests the possibility an existing trail across a Native allotment claim might qualify as a preexisting R.S. 2477 right-of-way, the Department is not required to adjudicate such rights-of-way. Since the adjudication of R.S. 2477 rights-of-way is primarily a matter for the state courts, and since no Departmental need would be served by an adjudication of the R.S. 2477 roadway in this case, no mention of the right-of-way should appear in the conveyance.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

The existence of a right-of-way for a road across public lands under sec. 8 of the Act of July 26, 1866 (R.S. 2477) (repealed subject to valid existing rights) is a question of state law the adjudication of which is normally left to the state courts.

The Sierra Club et al., 104 IBLA 17 (Aug. 17, 1988)

RIGHTS-OF-WAY--Continued

## REVISED STATUTES SEC. 2477--Continued

Under the regulation at 43 CFR 2804.1(b) decisions regarding rights-of-way under the regulations at 43 CFR Part 2800 are excepted from the automatic stay pending appeal provided by regulation at 43 CFR 4.21(a) and are effective pending appeal. No application was required for R.S. 2477 rights-of-way granted by statute for roads constructed over unreserved public lands and a decision finding no significant impact to adjacent public lands from improvement of an R.S. 2477 right-of-way is not a decision under the regulations at 43 CFR Part 2800 and, hence, is not excepted from the automatic stay pending appeal.

Sierra Club et al., 108 IBLA 381 (May 19, 1989)

The grant of a right-of-way under R.S. 2477 arose when a public highway over unreserved public lands was established pursuant to the laws of the jurisdiction where the land is located. A decision of BLM on judicial remand finding such a right-of-way exists will be affirmed where it is consistent with a ruling of the Federal court which is binding on the parties before the Board.

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSAs, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSAs may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by the county to ascertain whether they may involve any unnecessary or undue degradation to WSAs which would require preparation of an environmental impact statement.

Sierra Club et al., 111 IBLA 122 (Sept. 29, 1989)

RIGHTS-OF-WAY--ContinuedREVISED STATUTES SEC. 2477--Continued

Adjudication of an application for a recreational travel permit which found the proposed travel would take place on a public road right-of-way established pursuant to the Act of July 26, 1866, must be vacated where the record does not support a finding there is such a road within the permitted area of travel.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

RULES OF PRACTICE

(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department--if included in this Index.)

GENERALLY

The hearing requirement mandated by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), does not apply where the Bureau of Land Management has not concluded that a Native allotment application contains insufficient proof of qualifying use and occupancy of the claimed lands and has not determined to reject the application.

Leo Titus, Sr., 89 IBLA 323 (Nov. 13, 1985) 92 I.D. 578

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

RULES OF PRACTICE--ContinuedGENERALLY--Continued

A document sent certified mail by BLM to a person at his last address of record is considered to have been constructively served on that person at the time of return by the Postal Service of the undelivered certified letter, and such constructive service is equivalent in legal effect to actual service of the document. An oil and gas lessee's last address of record is that stated on the lease application form, unless the lessee has filed written notice of a change of address with the issuing BLM office. Thus, the time for filing a petition for reinstatement of a terminated oil and gas lease begins on the date the notice of termination was returned to BLM as undeliverable after it was sent to the lessee's last address of record, and expires 60 days later.

James Darby, 92 IBLA 231 (June 25, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)

In the normal course of review, the Board considers both the legal issues raised by appellants and the specific factual determinations on which the agency's decision was based. Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law.

Conoco Inc., et al., 96 IBLA 384 (Apr. 14, 1987)

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim

RULES OF PRACTICE--ContinuedGENERALLY--Continued

is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

When there is no dispute as to material facts, an appellant's due process rights are satisfied by an appeal to the Board of Land Appeals.

Henry Deaton, 101 IBLA 177 (Feb. 17, 1988)

Neither the assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving an attorney's contract is final for purposes of judicial review.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 16 IBIA 180 (July 22, 1988)

RULES OF PRACTICE--ContinuedGENERALLY--Continued

30 CFR 290.7 permits any party to a case adversely affected by a final decision of the Director, Minerals Management Service, to file an appeal with the Board of Land Appeals in accordance with the procedures provided in 43 CFR Part 4. Where in an appeal to the Board from a decision of the Director, there is no showing that a particular issue raised by appellant in the appeal before the Board was before the Director for consideration at the time he issued his decision, the appeal to the Board must be dismissed as to that issue, since, in the absence of consideration of and a decision on the issue by the Director, the Board lacks jurisdiction to consider the issue.

Blackhawk Coal Co., 104 IBLA 169 (Sept. 8, 1988)

"Adverse party." An "adverse party" to a case is one who will be disadvantaged if the agency decision is appealed and if the appellant prevails. A party who is determined by BLM to have priority for two oil and gas leases over another party will be disadvantaged if the latter prevails on an appeal to the Board of Land Appeals and should be named as an "adverse party" in the decision rejecting the latter's offer.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314



RULES OF PRACTICE--ContinuedGENERALLY--Continued

Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving a tribal attorney contract is final for the Department and is not subject to appeal with the Department.

Ronald T. Welch et al. v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 17 IBIA 56 (Jan. 30, 1989)

"Last address of record." In the processing of an application for assignment of a coal lease the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

RULES OF PRACTICE--ContinuedGENERALLY--Continued

The procedures set forth at 30 CFR 250.70-250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

Where an oil and gas lessee has entered into a seller's representative agreement and designated the operator of the lease as its representative for the tender of royalty payments to the United States, the service of documents relating to those payments, on the operator constitutes effective service upon the lessee.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989) 96 I.D. 408

In order to dismiss a proceeding on the basis of undue delay, the moving party must show that the delay directly and adversely affected its ability to present its evidence on a controlling factual or legal issue.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

APPEALSGenerally

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., California Wilderness Coalition,  
84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

Where, on appeal from rejection by BLM of a Native allotment application pursuant to an adjudication, precipitated only by the filing of a State protest in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), the State withdraws its protest in a stipulation agreed to by all parties, the Board will vacate the decision appealed from and remand the case to BLM with instructions to hold the application for approval under the statute.

Luke F. Kagak, 84 IBLA 350 (Jan. 17, 1985)

Where on appeal from a decision rejecting a desert land entry application because the applicant has failed to show that appropriate steps have been taken to acquire a water right, the applicant subsequently clarifies his intent such that a sufficient water right might be available, the decision rejecting the application will be set aside and the case file will be remanded to permit reconsideration of the application.

Silvita S. Rouseau, 85 IBLA 46 (Feb. 5, 1985)

Where an appeal has previously been taken and a final Departmental decision announced, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues, absent compelling legal or equitable reasons for reconsideration.

Village of South Naknek, 85 IBLA 74 (Feb. 11, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking a review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which should properly be submitted to and decided by BLM, nor does the Board render advisory opinions.

Edgar W. White, 85 IBLA 161 (Feb. 25, 1985)

As an appellate tribunal, the Board of Land Appeals may not make initial adjudicatory decisions on matters which properly should be submitted to and decided by BLM, nor does the Board render advisory opinions.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

Where a mining claimant appeals from an Administrative Law Judge's decision holding his claims invalid and makes vague assertions that prejudicial evidence was admitted at the hearing; that his expert witness was not permitted to testify that the claims could be mined profitably; and that the transcript was inadequate and incorrect, but offers no evidence to substantiate the assertions, such assertions will not serve as a basis for setting aside the Judge's decision.

United States v. Clyde L. Weekley, 86 IBLA 1 (Mar. 29, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

In an appeal arising from a decision by an Administrative Law Judge, the Board of Land Appeals may make findings of fact and conclusions based upon the record on appeal. The entire record before the Board may be considered in determining whether the decision appealed from is in error, and an appropriate order entered.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

The characterization of a submission as an appeal or request for reconsideration is not dispositive of how it should be treated. Even though an individual has not characterized a submission as an "appeal," where the effect of such submission is to challenge either the conclusion or the factual predicates of an adverse decision, it should be treated as an appeal.

Buck Wilson, 89 IBLA 143 (Oct. 1, 1985)

Constructive service of a Bureau of Land Management decision sent by certified mail to an applicant's address of record is made when the post office returns the decision to the Bureau stamped "unclaimed." The 30-day period for filing a notice of appeal from the decision commences at that time, and is not tolled, extended, or the constructive service vitiated, by actual receipt of the decision thereafter.

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

Approval of an activity plan, such as a recreation management plan compiled to implement a resource management plan amendment, is a decision appealable to the Board of Land Appeals. However, approval or amendment of a resource management plan is by regulation 43 CFR 1610.5-2 subject to review only by the Director, Bureau of Land Management, whose decision is final for the Department of the Interior.

Wilderness Society et al., 90 IBLA 221 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

Where a Native village corporation elected to take a reserve as it existed and was described as of Dec. 18, 1971, pursuant to sec. 1437 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1641 (1982), and the boundaries of the reserve as described on Dec. 18, 1971, can be determined, such election is deemed to be a complete satisfaction of its entitlement.

Tetlin Native Corp., 93 IBLA 369 (Sept. 17, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)



# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Generally--Continued

The Mineral Leasing Act, as amended, 30 U.S.C. § 191 (Supp. III 1985), and 30 CFR 219.100 provide for placement of those royalty payments payable to a state which are under challenge in a suspense account pending resolution of the dispute. Where the district court orders an oil and gas lessee to make additional royalty payments and the lessee complies but appeals from the district court decision, a decision by the Minerals Management Service to distribute the additional and disputed funds to the State of Alaska will be reversed on appeal to the Board of Land Appeals in accordance with 30 U.S.C. § 191 (Supp. III 1985) and 30 CFR 219.100.

Marathon Oil Co., 94 IBLA 78 (Sept. 30, 1986)

When Congress amended 30 U.S.C. § 191 (Supp. III 1985), it included means to protect the royalty beneficiaries from loss due to delay in the collection of the disputed amount. An order to pay the disputed royalty may not be suspended under 30 CFR 243.2 unless the lessee submits a bond "deemed adequate to indemnify the lessor from loss or damage." A bond will not be deemed adequate unless it includes the amount of interest that the disputed royalty would earn during the pendency of the dispute.

Blackhawk Coal Co. (On Reconsideration), 94 IBLA 215 (Nov. 5, 1986)

When subsequent to execution of a mineral material sales contract, the Department has amended the regulation providing for automatic termination of such a contract for failure to submit an in lieu of minimum annual production payment on or before the anniversary date by giving the authorized officer discretionary authority to terminate, the Board will set aside a BLM decision holding the contract to have automatically terminated and remand the case to BLM to allow the exercise of its discretion.

T. Brown Constructors, Inc., 95 IBLA 107 (Jan. 6, 1987)

# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Generally--Continued

When a range-line agreement between two licensees provides a division of the range will stand until such time as a range study is conducted, and the range study indicates the allotments do not fairly represent the proportion of range lands each party is entitled to on a demand-forage basis, an Administrative Law Judge's decision finding that one of the licensees may be entitled to an adjustment of grazing privileges and remanding the case to BLM to effect an equalization will be affirmed upon appeal.

Bureau of Land Management, K. S. Summers Livestock, Inc. v. Spring Creek Ranch, 96 IBLA 4 (Feb. 26, 1987)

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35 (Feb. 26, 1987)

When, on appeal, a Native allotment applicant is challenging a survey of the land described in an allotment application claiming it is not the land he intended to apply for, and evidence is submitted indicating the applicant may have executed and submitted a later application prior to repeal of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), the case will be referred for a hearing before an administrative law judge who will determine whether the later application was an amended application pending before the Department on or before Dec. 18, 1971.

Stephen Northway, 96 IBLA 301 (Apr. 2, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

Weathersby Godbold Carter, Richard T. Harriss, III,  
97 IBLA 108 (Apr. 29, 1987)

Where a determination of Native group eligibility has been made by the Bureau of Indian Affairs pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the doctrine of administrative finality operates to bar the eligibility issue from consideration in an appeal from a decision approving lands for patent pursuant to sec. 14(h)(2) of the Act, 43 U.S.C. § 1613(h)(2) (1982).

U.S. Fish & Wildlife Service, Rust's Flying Service,  
Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27,  
1987)

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

Tennessee Consolidated Coal Co. v. Office of Surface  
Mining Reclamation & Enforcement, 99 IBLA 274 (Oct. 20,  
1987)

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

Bill Smith Coal Co. v. Office of Surface Mining  
Reclamation & Enforcement, 101 IBLA 224 (Feb. 26,  
1988)

As an appellate tribunal, the Board of Land Appeals does not exercise supervisory authority over BLM except in the context of an actual case in controversy over which the Board has jurisdiction. The Board will not consider challenges to policy statements issued by BLM, or give opinions on abstract propositions.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

Where on appeal from a BLM decision rejecting a Native allotment application because the application was not pending before the Department on Dec. 18, 1971, the Board determines that there is a question of fact whether the application was pending on that date, the Board will set aside the BLM decision and refer the case for a hearing before an Administrative Law Judge.

Heirs of Linda Anelson, 101 IBLA 333 (Mar. 23, 1988)

June I. Degnan, 108 IBLA 282 (Apr. 26, 1989)

Where an Administrative Law Judge has made an interlocutory ruling that an applicant's failure to file its application for review timely did not deprive him of jurisdiction over the matter, and where the judge has considered and denied OSMRE's request that this question be certified to the Board of Land Appeals under 43 CFR 4.1124, OSMRE's petition for permission to

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

appeal the interlocutory ruling to the Board under 43 CFR 4.1272(a) is properly granted, because resolution of this question will materially advance disposition of the case.

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

Absent compelling legal or equitable reasons for reconsideration, when an appeal has previously been taken and a final Departmental decision has issued, the doctrine of administrative finality bars consideration of a new appeal arising from a later proceeding involving the same claim and issues.

Joe N. Johnson, 103 IBLA 5 (June 22, 1988)

Sec. 104(a) of the Federal Oil and Gas Royalty Management Act of 1982, amending, sec. 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1982), authorizes but does not require retention of challenged royalty payments payable to a state in a suspense account pending resolution of the dispute. No authority is found in this statutory provision for payment of interest to the lessee/payor on any royalty payments ultimately found to be refundable.

Marathon Oil Co. (On Reconsideration), 103 IBLA 138 (July 20, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

A "petition to intervene" in a pending appeal is properly denied where the party seeking to participate does not offer comments on the decision on appeal, but instead challenges an earlier decision by BLM that has been previously considered by the Board of Land Appeals.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

Approval or amendment of a resource management plan are not actions appealable to the Board of Land Appeals. However, any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is implemented. A BLM decision implementing a resource management plan calling for closure of a wildlife management area to vehicles during fire season will be affirmed when the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal.

Albert Yparraquirre, 105 IBLA 245 (Nov. 4, 1988)

Since, under 43 CFR 4.450-2, a protest is any objection to any action "proposed to be taken," a protest may not properly be filed where the action complained of has already taken place.

The Wilderness Society, 106 IBLA 46 (Dec. 8, 1988)

In the absence of regulations specifically delineating how service of an invoice by MMS is effectuated, a payor engaged in a business relationship with MMS may specify a particular office or official to whom bills for collection should be directed. Service of an MMS bill for collection is not perfected until receipt by the official previously



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

designated by the payor as the official to whom such notices should be directed.

Coastal Oil & Gas Corp., 106 IBLA 90 (Dec. 13, 1988)

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

Where, during the pendency of an appeal from a denial of a cultural resource use permit, new regulations are promulgated establishing review procedures for challenging the denial of an application for a cultural resource use permit, the Board may set aside the decision under appeal and remand for application of those procedures.

Jicarilla Archaeological Services, 110 IBLA 57 (July 13, 1989)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedGenerally--Continued

Except in areas under wilderness review, mining plans of operations become effective immediately upon the approval pursuant to provision of 43 CFR 3809.4(b). This regulatory provision makes approval of a mining plan of operations a final Departmental action immediately subject to judicial review.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

Where MMS issues an order requiring the submission of additional past royalties and thereafter denies a request from the lessee that it be permitted to post a bond in lieu of tendering the money during the pendency of an appeal, the failure of the lessee to appeal from the decision of MMS denying the request to post a bond and the subsequent tender of the amount demanded constitutes a waiver of any objection to the requirement that the money be tendered during the pendency of the appeal.

Transco Exploration Co. & TXP Operating Co., 110 IBLA 282 (Sept. 13, 1989) 96 I.D. 367

Answers

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989) 96 I.D. 408

Burden of Proof

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocurring the hay from another source was reasonable.

Appeal of Malheur Lake Farms, Inc., IBCA-1808 (Jan. 28, 1985)  
92 I.D. 63

Where the reasonable rental value of Government-furnished quarters has been determined in accordance with accepted appraisal procedures pursuant to Departmental directives, and the occupant alleges that his rent is excessive, the burden is on the occupant to prove by positive, specific, and substantial evidence that the appraisal is in error.

Appeal of James P. Glynn, 6 OHA 13 (Feb. 6, 1985)

Where the Board has referred a high-bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

California Energy Co. (On Reconsideration), 85 IBLA 254 (Mar. 6, 1985)  
92 I.D. 125

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

Appeal of Industrial Constructors, Inc., IBCA-1831 (Mar. 26, 1985)  
92 I.D. 146

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

Appeal of James L. Patten d.b.a. James Patten Logging, IBCA-1873 (Apr. 29, 1985)  
92 I.D. 172

Where a party appeals the BLM issuance of special recreation use permits, it is the obligation of appellant to show that the determinations to issue the permits are erroneous. Unless a statement of reasons shows adequate basis for appeal and the allegations are supported with evidence showing error, the appeals cannot be afforded favorable consideration.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

Appeal of Timberland Management, IBCA-1877 (July 31, 1985)  
92 I.D. 340



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden of Proof--Continued

The burden of proof is on an appellant to show error in the decision appealed from and, in the absence of such a showing, the decision will be affirmed.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

When the parties differ as to the amount payable as an equitable adjustment for overrun quantities of soil-cement for slope protection placed on the embankment portion of a dam and when the principal item on which the parties are apart involves equipment costs, the Board finds that the appellant has failed to show that it is entitled to any greater amount than was allowed by the contracting officer where (i) information as to the cost of contractor-owned equipment was available in the contractor's records; (ii) such information was not furnished to the Government at the time of the audit of the contractor's books or at any time thereafter; (iii) instead of furnishing its costs for contractor-owned equipment, the appellant chose to rely upon a construction guideline for costing such equipment (a lot of which was fully depreciated) despite the fact that the guidelines relied upon specifically state that they should not be used for construction such as dams, highways, and bridges; (iv) by reason of the appellant's failure to furnish its costs for contractor-owned equipment, the Board was unable to apply the standards set forth in FPR 1-15.205-9 to determine the amount to which the appellant was entitled; and (v) the comparisons made by the project engineer to which he testified support

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden of Proof--Continued

the amount allowed by the contracting officer as an equitable adjustment.

Under a contract for the construction of a dam requiring that, except for the initial layer, all layers of soil-cement slope protection be placed in lifts 8 feet wide, the contractor sought an equitable adjustment on the ground that by reason of safety it had been necessary to place the soil-cement in 9-foot-wide lifts since it would have been dangerous to attempt to maneuver its 8-foot-wide dump trucks so as to keep them on the 8-foot-wide soil-cement layers during the laydown operation and, in any event, it would have been virtually impossible to do so since the soil-cement layers themselves and the semi-pervious portion of the inclined bank were either slippery or slick. In denying the claim, the Board found that the appellant had failed to prove its claim by a preponderance of the evidence. Supporting the denial were the Board's findings (i) that the specification requirement that the soil-cement layers be placed in 8-foot lifts did not create a condition which was hazardous per se since it was contemplated that the contractor would use part of the slope of the dam for the inside wheels of the dump trucks in the placing procedure; (ii) that this was common practice in laying a soil-cement slope; (iii) that during the laydown operation the dump trucks used in placing the soil-cement consistently had at least their outer tires on the semi-pervious portion of the slope leaving a foot or so of space between the outside duals and the edge of the soil-cement lifts on the reservoir side; (iv) that while the project engineer knew that the contractor was placing and to some extent compacting soil-cement outside the 8-foot width shown on the plans, he attributed that to the fact that the contractor did not have the equipment to provide edge control for 8-foot widths; and (v) that with careful experienced drivers, the placement of soil-cement in 8-foot-wide lifts was a relatively safe operation.

In connection with its findings, the Board notes that while appellant's witnesses concerned with operation testified that the soil-cement layers and the semi-pervious portion of the inclined bank were slippery or slick at least most of the time, there is no evidence of record showing that at any time during the contract performance the appellant characterized either of the two surfaces (the soil-cement layers or



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

the semi-pervious portion of the inclined bank) as slippery or slick.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986) 93 I.D. 27

Under a dam rehabilitation contract containing unit prices for construction items, where the Government claims it is entitled to a downward equitable adjustment on change order work but fails to offer any persuasive evidence in support of the revised unit prices contended for, the Board finds that the Government has failed to sustain its burden of proof.

A. D. Rossi Corp., IBCA-1923 (Feb. 27, 1986) 93 I.D. 92

Where the Government has presented evidence that various dependent millsites are not being used or occupied for mining and milling purposes, the Government has established a strong prima facie case of invalidity, as such use or occupancy is a prerequisite to the validity of a millsite claim under 30 U.S.C. § 42 (1982). Upon presentation of such evidence, the burden shifts to the millsite claimant to affirmatively establish that the claim is used or occupied for mining and milling purposes.

United States v. Elmer H. Swanson, Livingston Silver, Inc., 93 IBLA 1 (July 14, 1986) 93 I.D. 288

Where BLM declares a mining claim null and void because it was located on land previously withdrawn from mineral entry, the burden of proof of error in the decision appealed rests with the appellant and, in the absence of such a showing, the decision will be affirmed.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

When a party appeals a BLM easement determination made pursuant to ANCSA and Department regulations, the burden of proof is on the party challenging the determination to show that the determination is erroneous. A decision to reserve easements will ordinarily be affirmed as long as it is supported by a rational basis and the record.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

A party appealing a rejection of a bid submitted in a competitive oil and gas lease sale because the bid has been found to be less than the fair market value has the affirmative obligation to prove the Government estimate was inaccurate and the bid submitted represents fair market value.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

When the Government contests a Native allotment application on the basis of a failure to meet the requirements of the Native Allotment Act and the regulations, the contest is subject to dismissal where at the hearing the Government fails to present sufficient evidence to establish a prima facie case to support its complaint. However, where the applicant goes forward and presents evidence, all the evidence will be considered to determine whether a preponderance of that evidence establishes that the statutory and regulatory use and occupancy requirements were not met.

The standard of proof requirement to be applied in Native allotment cases is the preponderance of evidence standard, rather than the previously utilized standard of clear and credible evidence.

United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)  
First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

The burden is on the lessee/operator to establish that the plugging and abandonment of an oil and gas well has been conducted in accordance with a written plan approved by the authorized officer as required by regulation at 43 CFR 3162.3-4(a). Where the record on appeal from a decision requiring an operator to replug a well discloses a material issue of fact regarding whether the well was properly plugged, the case is properly referred for an evidentiary hearing pursuant to 43 CFR 4.415.

Coleman Oil & Gas, Inc., 104 IBLA 363 (Sept. 27, 1988)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the finding is supported on the record by geologic evidence and the analysis of the Department's technical experts, the

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden\_of Proof--Continued

determination will not be altered in the absence of a showing of error by a preponderance of the evidence.  
Winston L. Thornton et al., 106 IBLA 15 (Nov. 30, 1988)

An appellant who does not show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. A party challenging a BLM determination that lands are within a KGS has the burden of establishing by a preponderance of the evidence that inclusion of the land is erroneous.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 107 IBLA 143 (Feb. 7, 1989)

John R. Stamper, BHP Petroleum (Americas), Inc., 110 IBLA 130 (Aug. 9, 1989)

The Department is entitled to rely on the reasoned analysis of its technical experts in matters within the realm of their expertise. If BLM supports a decision regarding the volume of gas avoidably lost by an operator with sufficient evidence to demonstrate a rational basis for that decision and that the decision was made in a careful and systematic manner, using the advice of such experts, the decision will not be rejected without a showing of error. The party challenging the decision has the burden of showing by

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedBurden of Proof--Continued

a preponderance of the evidence that the determination is erroneous.

Mallon Oil Co., 107 IBLA 150 (Feb. 10, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that her leased lands are within the known geologic structure of a producing oil or gas field has the burden of proving that determination to be correct.

Where the Secretary's technical expert has made a reasoned analysis of available geologic data, the Secretary is entitled to rely on that opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 112 IBLA 13 (Nov. 14, 1989)

Discovery

No sanctions were imposed on the Government for its failure to comply with a discovery order where its failure was not shown to be willful or to have caused appellant substantial prejudice. Noted by the Board was the fact that throughout much of the period of time within which the Government was to respond to the discovery order, appellant had been either unwilling or unable to comply with requests of Government auditors for cost information pertaining to appellant's multiple claims and that scheduling the various appeals for hearing was dependent upon the requested information being furnished not only in regard to discovery but also with respect to the Government audit.

Appeal of Hardrives, Inc., IBCA-2375 (Oct. 14, 1988)  
95 I.D. 215

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal

Where the State of Alaska appeals a decision holding that a Native allotment is not subject to a right-of-way granted to the State and on appeal the heirs of the allottee relinquish that part of the allotment in conflict with the right-of-way, the issue is moot and the appeal is dismissed.

State of Alaska, 85 IBLA 170 (Feb. 26, 1985)

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

An appeal brought by a person who does not fall within the categories of persons authorized by regulation to practice before the Department is subject to dismissal.

Ganawas Corp., 85 IBLA 250 (Mar. 6, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our ecoSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

James R. Hensher et al., 85 IBLA 343 (Mar. 22, 1985)  
92 I.D. 140

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)

Where the Board found that the Government had failed to show prejudice from delays resulting in part from its own participation in requests and a stipulation for postponement, all in anticipation of amicable settlement of the claims involved, the Government's motion to dismiss for lack of prosecution was denied.

Appeals of Whitesell-Green, Inc., IBCA-1927 - 1940  
(June 13, 1985) 92 I.D. 263

An appeal brought by a person who does not fall within any of the categories of persons authorized by regulation to practice before the Department is subject to dismissal. Where the record does not show the party presenting the appeal is qualified under the regulations, the appeal will be dismissed.

Robert G. Young, 87 IBLA 249 (June 20, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

David D. Beal, Gary Williams, & Michael Stone, 90 IBLA 87 (Dec. 23, 1985)

An appeal to the Board of Land Appeals of a decision by the Director, Bureau of Land Management, affirming a regional conservation manager's decision not to approve a unit agreement will be dismissed as moot where the noncompetitive oil and gas leases proposed for inclusion in the unit have expired by the running of their primary terms without benefit of development or production. Delays by the Department in considering an appeal pursuant to 30 CFR Part 290 of the conservation manager's decision do not constitute a de facto suspension of the oil and gas leases proposed for the unit which would extend the leases.

Jack J. Grynberg, 88 IBLA 330 (Sept. 19, 1985)

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal may be dismissed.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

Pursuant to 43 CFR 4.411, a notice of appeal must be filed within 30 days of the date the person appealing is served with the decision being appealed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (Dec. 4, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

An appeal from a decision of the Bureau of Land Management will be dismissed for appellant's failure to show that she has been adversely affected where BLM's decision held that appellant's certificate of allotment be issued subject to the continued right of public access across allotment lands if survey verifies that a trail crosses the allotment.

Gladys Boquist, 90 IBLA 168 (Jan. 8, 1986)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173 (Jan. 21, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 226 (June 24, 1986)

Don G. Carpenter, 94 IBLA 7 (Sept. 18, 1986)

Andre C. Capella, 94 IBLA 181 (Oct. 29, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

B. L. & Norma Jean Newman et al., 92 IBLA 314 (June 26, 1986)

An appeal does not become moot simply because the appellant has complied under protest with the decision from which the appeal was taken. An appeal is properly

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

dismissed as moot only if the Board can provide no effective relief.

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365 (July 1, 1986)  
93 I.D. 285

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to adjoining landowners who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 93 IBLA 155 (July 31, 1986)

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

An appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an order of this Board requiring a showing of cause why the appeal should not be dismissed.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Altman, 93 IBLA 265 (Aug. 28, 1986)

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

F. Howard Walsh, Jr., Mae Lamar Davis & Newton Lamar, 93 IBLA 297 (Sept. 9, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

Where a notice of appeal is not filed within 30 days after the person filing the notice has been served with a decision, the Board does not have jurisdiction to review that decision.

Idaho Natural Resources Legal Foundation, Inc., 94 I.D. 35  
96 IBLA 19 (Feb. 26, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

Where BLM conditions its decision that an unpatented mining claim is abandoned and void upon an opportunity to produce evidence of timely filing within the following 30-day period, the appeal period does not commence until the day after the end of the stipulated compliance period.

Luella S. Collins (On Reconsideration), 101 IBLA 399 (Apr. 4, 1988)

A Government motion to dismiss a claim of differing site conditions is denied where the motion is based upon a purported accord and satisfaction attributed to the contractor accepting a change order and a supplement thereto but the Board notes that an accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord entitling appellant to an oral hearing as requested.

Appeal of T. Ferguson Construction, Inc., IBCA-2365 (May 3, 1988)

Under 30 CFR 775.11(a), a request for a hearing must be filed within 30 days after an applicant or permittee is notified of OSMRE's final decision on an application for a permit revision. The timely filing of a request for a hearing is jurisdictional and failure to file the request within the time allowed requires dismissal of the proceedings.

Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement & Peabody Coal Co., 103 IBLA 44 (June 27, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

An appeal is ordinarily dismissed as moot where, as a result of events occurring after the appeal is filed (e.g., withdrawal of the application at issue), there is no effective relief which the Board can afford to the appellant.

The Sierra Club et al., 104 IBLA 17 (Aug. 17, 1988)

30 CFR 290.7 permits any party to a case adversely affected by a final decision of the Director, Minerals Management Service, to file an appeal with the Board of Land Appeals in accordance with the procedures provided in 43 CFR Part 4. Where in an appeal to the Board from a decision of the Director, there is no showing that a particular issue raised by appellant in the appeal before the Board was before the Director for consideration at the time he issued his decision, the appeal to the Board must be dismissed as to that issue, since, in the absence of consideration of and a decision on the issue by the Director, the Board lacks jurisdiction to consider the issue.

Blackhawk Coal Co., 104 IBLA 169 (Sept. 8, 1988)

Generally, the Board will dismiss an appeal challenging the results of a dependent resurvey if the lands on both sides of the disputed boundary have been patented to private owners prior to the time the protest is lodged.

A resurvey conducted by the Cadastral Survey is improperly undertaken to the extent it establishes

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

boundaries between private tracts of land if the survey of those boundaries is not necessary to establish a boundary between private and Federal lands. Once patent has been issued, the rights of the patentees are fixed and the Government has no power to interfere with such rights by resurveying the boundaries.

James S. Mitchell, William Dawson, 104 IBLA 377 (Sept. 27, 1988)

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

James C. Mackey, 104 IBLA 393 (Oct. 4, 1988)

Where, pursuant to a Federal District court order, BLM issues a decision establishing an optimum number of wild horses for a grazing allotment and appeals are filed challenging BLM's determination of that optimum number, but during the pendency of those appeals, the Federal District Court issues another order expressly directing the Secretary to remove wild horses from the allotment in excess of that optimum number and thereby judicially approving that optimum number, the appeals will be dismissed as moot.

Craig C. Downer et al., 105 IBLA 369 (Nov. 29, 1988)

The failure to file a timely notice of appeal under 43 CFR 4.411(c) deprives the Board of jurisdiction over the subject matter of the appeal. Where an individual who has appealed one decision issued by BLM attempts to raise matters that were finally decided in an earlier decision, which decision was not



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

appealed, the appeal is not timely as to those prior matters which could have been appealed earlier.

The Wilderness Society, 106 IBLA 46 (Dec. 8, 1988)

A Government motion to dismiss an appeal for lack of jurisdiction over the claims asserted is denied where the Board finds on the basis of controlling precedents that under the Contract Disputes Act the Board has jurisdiction over an appeal from a default termination absent a monetary claim by the parties and that it is not precluded from exercising jurisdiction over such an appeal by the failure of the contracting officer to issue a requested final decision where the record shows that the contracting officer gave de facto consideration to the claims and in effect denied them.

Appeal of Philomath Timber Co., IBCA-2409 (Dec. 12, 1988) 95 I.D. 257

An instruction memorandum is merely a document for internal use by BLM employees and has no legal force or effect. It is not directed to outside parties and neither initiates or disposes of an individual case, so it is not a "decision" subject to appeal under 43 CFR 4.410.

State of Alaska, 106 IBLA 160 (Dec. 20, 1988) 95 I.D. 304

Practice before the Interior Board of Land Appeals is controlled by 43 CFR 1.3. An appeal brought by a person who does not fall within any of the categories of persons authorized to practice before the Department is subject to dismissal.

Leonard J. Olheiser, 106 IBLA 214 (Dec. 22, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

The Board will not dismiss as moot an appeal from a BLM decision approving an application for a permit to drill within a designated resource protection zone surrounding units of the Hovenweep National Monument, even though the well has been drilled, plugged, and abandoned, where the appeal presents a significant issue regarding the adequacy of BLM's assessment of the environmental impact of approving the application, and the record indicates the issue is likely to recur within the protection zone.

Colorado Environmental Coalition et al., 108 IBLA 10 (Mar. 20, 1989)

The principle of res judicata and its administrative counterpart, the doctrine of administrative finality, precludes reconsideration of a decision of a Departmental official in the absence of compelling legal or equitable reasons when a party or his predecessor-in-interest had an opportunity to obtain review within the Department and took no action. An appeal is properly dismissed where appellant is

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

reapplying for patent 24 years after the prior application was rejected by final Departmental decision.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

Where the Director, MMS, issues a decision in which he reserves the right to conduct further audits of certain Federal oil and gas leases and processing plants, the royalty payor is not adversely affected and, therefore, lacks standing to appeal that declaration.

Phillips Petroleum Co., 109 IBLA 4 (May 23, 1989)

Where, on appeal from a denial of a protest, an appellant fails to make an adequate showing how any legally cognizable interest has been adversely affected by the denial of the protest, such an appellant will be deemed to lack standing to appeal and the appeal will be dismissed.

Colorado Open Space Council, Sierra Club, 109 IBLA 274 (June 20, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was filed within 30 days after service of the decision upon the party or parties of record.

Low Landers, 109 IBLA 391 (June 26, 1989)

Pursuant to 30 CFR 290.7 any party adversely affected by a final decision of the Director, Minerals Management Service, may file an appeal with the Board. Where the issues raised before the Board were not raised before the Director, the appeal must be dismissed for lack of jurisdiction.

ANR Production Co., 110 IBLA 127 (Aug. 8, 1989)

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedDismissal--Continued

An appeal from a decision approving an application for a recreational permit for a motor vehicle trip through Arch Canyon, Utah, could not be dismissed as moot even though the challenged event had occurred, where issues raised by the appeal were capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

Southern Utah Wilderness Alliance et al., 111 IBLA 207 (Oct. 12, 1989)

An appeal may be properly dismissed as moot where, as a result of events occurring subsequent to the appeal, there is no further relief which can be granted on appeal.

Craig C. Downer, 111 IBLA 339 (Oct. 31, 1989)

Effect\_of

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedEffect\_of--Continued

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

Marathon Oil Co., 90 IBLA 236 (Jan. 30, 1986) 93 I.D. 6



# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Effect\_of--Continued

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

B. K. Killion, 90 IBLA 378 (Feb. 27, 1986)

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

Prima Exploration, Inc., 96 IBLA 80 (Mar. 2, 1987)

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Effect\_of--Continued

When a Bureau of Land Management decision has been properly appealed to the Board of Land Appeals by an adversely affected party, the Bureau loses jurisdiction over the case and has no authority to take further dispositive action on the subject matter of the appeal. Should the Bureau desire to take such action, it may request that the Board take the action or ask the Board to restore the Bureau's jurisdiction by remanding the case for it to take the action.

Melvin N. Barry, Frank Simpson, 97 IBLA 359 (May 26, 1987)

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather, it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

An "appeal" of action proposed to be taken by BLM is a protest, and where that protest contains absolutely no reason for objection to the proposed action, BLM may summarily dismiss the protest. Where the protest is subsequently forwarded to the Board for review as an appeal, the "appeal" will be dismissed because to treat the protest as an appeal and to allow a protestant to present his objections to the proposed action for the first time on appeal would put the Board in the position of being the initial decisionmaker and would frustrate the Departmental framework for decisionmaking.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

Pursuant to 43 CFR 3165.4 (1986), decisions of BLM officials implementing the onshore oil and gas operating regulations at 43 CFR Subpart 3160 are an exception to the general rule set forth at 43 CFR 4.21(a), and are not automatically stayed pending appeal. Once an appeal to the Board has been filed,

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedEffect\_of--Continued

requests for suspension are properly filed with the Board of Land Appeals.

Southern Utah Wilderness Alliance, 100 IBLA 63 (Nov. 30, 1987)

A notice of realty action issued by the Bureau of Land Management to notify the public of a proposed direct sale of public land and to solicit comments on the proposal is not a decision subject to appeal under 43 CFR 4.410, since it is merely an announcement of action proposed to be taken.

Kenneth W. Bosley, 102 IBLA 235 (May 19, 1988)

The effect of 43 CFR 4.21(a) is only to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal. It does not have the effect of suspending BLM's authority to act on matters that are functionally independent from the subject of the appeal. The unavailability of some lands in a noncompetitive over-the-counter lease offer has no effect on the validity of the offer for the remainder of the lands in the offer. Thus, the question of the correctness of BLM's rejection of part of an offer is independent from the question of the status of the offer for the remainder of the lands that it covers, so that BLM is free to accept the offer for the remainder notwithstanding that the time for appealing the partial rejection has not expired.

Robert B. Bunn, 102 IBLA 292 (May 31, 1988)

Application for approval by the Bureau of Land Management of an assignment of record title to an oil and gas lease is made by the assignee of the lease. An assignment filed in conformance with the applicable law and regulations ordinarily requires approval by

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedEffect\_of--Continued

the Department as to qualifications of the assignee and sufficiency of a bond.

Ernhart, Inc., Thomas Hope, Jr., 108 IBLA 267 (Apr. 25, 1989)

Under the regulation at 43 CFR 2804.1(b) decisions regarding rights-of-way under the regulations at 43 CFR Part 2800 are excepted from the automatic stay pending appeal provided by regulation at 43 CFR 4.21(a) and are effective pending appeal. No application was required for R.S. 2477 rights-of-way granted by statute for roads constructed over unreserved public lands and a decision finding no significant impact to adjacent public lands from improvement of an R.S. 2477 right-of-way is not a decision under the regulations at 43 CFR Part 2800 and, hence, is not excepted from the automatic stay pending appeal.

Sierra Club et al., 108 IBLA 381 (May 19, 1989)

When a BLM decision has been properly appealed to the Board by an adversely affected party, BLM loses jurisdiction over the case and it has no authority to take further dispositive action on the subject matter of the appeal until the Board rules on the appeal. However, that does not mean that BLM is precluded from entering into settlement negotiations with the appellant. The rule regarding jurisdiction precludes BLM, however, from finally disposing of the matter without regaining jurisdiction from the Board. Therefore, where negotiations are successful and the parties agree on a settlement after the filing of an appeal, the proper procedure is for BLM to request that the Board vacate BLM's decision and remand the case to it to take formal dispositive action to implement the settlement agreement.

Clive Kincaid, 111 IBLA 224 (Oct. 17, 1989)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedEffect\_of--Continued

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Davis Exploration, 112 IBLA 254 (Dec. 28, 1989)

Extensions\_of Time

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989)  
96 I.D. 408

Failure\_to\_Appeal

Where in 1964 a tract of public land was offered for public sale pursuant to 43 U.S.C. § 1171 and the adjacent landowners were declared the purchasers, but the sale was subsequently vacated and all money reimbursed by a decision which afforded them the right of appeal, and where no appeal was taken and 43 U.S.C. § 1171 was thereafter repealed, the decision became final and no residual rights under that sale or the repealed statute survived. Therefore, a protest by these same landowners against the re-offering of this tract for sale pursuant to 43 U.S.C. § 1713, based on their asserted priority at the 1964 sale, is properly dismissed.

George Henke, Beatrice Henke, 87 IBLA 81 (May 29, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedFailure\_to\_Appeal--Continued

Where, following a contest hearing, certain mining claims are declared null and void for lack of discovery of a valuable mineral deposit and the claimant fails to appeal and, in essence, acquiesces in the decision over a long period of time, mining claim recordation filings for the same claims are properly rejected.

Emma Grace Lowe, 87 IBLA 207 (June 18, 1985)

Where appellant failed to appeal from a 1982 Departmental decision establishing the date of priority of its noncompetitive oil and gas lease offer and acquiesced in the 1982 decision until 1985, it may not reopen the 1982 decision for the reason that it had failed to understand the consequence of the decision could be adverse.

Inexco Oil Co., 93 IBLA 351 (Sept. 15, 1986)

The failure to file a timely appeal from a decision approving an interim conveyance of land to a Native corporation precludes a later appeal as to that land. Such an appeal must be dismissed.

City of Klawock, 94 IBLA 107 (Oct. 7, 1986)

Under 43 CFR 4.410, the timely filing of a notice of appeal is necessary to establish jurisdiction over a matter. Failure to file a timely appeal has the result that a decision becomes final action for the Department, and the Board will not consider the validity of such decisions in a later appeal. The failure to file a timely appeal from decisions declaring mining claims abandoned and void precludes the Board from considering the validity of the claims in an appeal from the rejection of a patent application for those claims.

U. A. Small, 108 IBLA 102 (Mar. 29, 1989)



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedFailure to Appeal--Continued

If the successful bidder for a competitive oil and gas lease elected to execute a special stipulation required by BLM rather than appealing the decision requiring the stipulation, failure to appeal that decision renders it final and precludes the lessee from contending, in a later appeal brought from action by BLM enforcing the stipulation, that the requirement was not properly imposed.

George A. Haddad, Jr., 109 IBLA 394 (June 26, 1989)

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

Hearings

Where BLM has issued a decision which levied an assessment for noncompliance with a previous order with respect to the operation of oil and gas wells on non-competitive oil and gas leases and has afforded the lessee a technical and procedural review in accordance with 43 CFR 3165.3, the decision of that official is binding.

Riviera Drilling & Exploration, 87 IBLA 357 (June 27, 1985)

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedHearings--Continued

questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.  
Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

Where lands described in a previously relinquished Native allotment application are patented to another, and the applicant requests reinstatement of the relinquished application, the Department has a duty to a Native allotment applicant to make a preliminary investigation and determination regarding whether the relinquishment was voluntary and knowing. If it was not, the application should be reinstated and, if deemed appropriate, the Department should pursue recovery of such lands. When a document stating an intent to relinquish a Native allotment application is suspect on its face, a petition for reinstatement of the application should not be denied until the authenticity of the relinquishment document is verified.

Matilda Titus, 92 IBLA 340 (June 30, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedHearings--Continued

Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

The decision of an Administrative Law Judge finding that a Native allotment applicant unknowingly and involuntarily relinquished his Native allotment in 1966 will be reversed on appeal where the Judge relies on the self-serving testimony of the applicant, characterizing it as un rebutted, and disregards more reliable evidence, specifically a memorandum prepared by a Bureau of Land Management employee on the same day the relinquishment was secured and a 1976 letter written by the applicant.

Peter Andrews, Sr. v. Bureau of Land Management, 93 IBLA 355 (Sept. 15, 1986)

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) <sup>94</sup> I.D. 132

BLM has the authority to determine whether a relinquishment of a Native allotment application was voluntary and knowing and not fraudulently procured in making a preliminary determination whether to recommend a suit to cancel a patent which was issued to the State of Alaska after the relinquishment with respect to land originally covered by the allotment application. Where the applicant requests an oral

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedHearings--Continued

hearing to present evidence on the validity of a relinquishment, the Board will order a hearing pursuant to 43 CFR 4.415, in which the State will be allowed to intervene.

Feodoria (Kallander) Pennington, 97 IBLA 350 (May 26, 1987)

The Board will not order a further hearing in a mining claim contest where the claimant failed to appear at or participate in the original hearing and, on appeal from a decision declaring his claim null and void for lack of a discovery of a valuable mineral deposit, he has made unsupported allegations but has provided no evidence that a further hearing would produce a different result.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

United States v. Kendrick Holder, 100 IBLA 146 (Dec. 2, 1987)

Where, on appeal from a BLM decision rejecting a desert land entry application because it is considered not economically feasible to farm the land sought, the applicant presents evidence contradicting crucial aspects of BLM's economic analysis, including the anticipated yield of a particular crop and the cost of securing electricity for a water pump, sufficient to raise questions of fact, the BLM decision will be set

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedHearings--Continued

aside and the case referred for a hearing and subsequent decision by an Administrative Law Judge.

Frederick C. Tullis, Kathleen E. Tullis, 102 IBLA 215 (May 10, 1988)

A request for a hearing will be granted only where there is a material issue of fact requiring resolution through the introduction of testimony or other evidence. In the absence of such an issue, no hearing is required.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

An application for patent filed on behalf of the successor-in-interest to the grantee, as innocent purchaser for value from the railroad, pursuant to section 321(b) of the Transportation Act of 1940, is properly rejected when the land was known to be mineral in character at the time of conveyance, because title to land known to be mineral in character did not pass pursuant to the railroad grant statutes. If the applicant disputes this finding, a hearing is ordinarily required.

Lloyd D. Hayes, 108 IBLA 189 (Apr. 13, 1989)

When an appellant fails to submit any evidence tending to contradict the evidence presented by the Bureau of Land Management, there is no factual dispute and the Board will reject appellant's request for an evidentiary hearing pursuant to 43 CFR 4.415.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedHearings--Continued

The Director, MMS, held that the lessee violated 30 CFR 250.41(a)(2) because it knew or should have known that its actions could result in a blowout leading to the loss of gas. The lessee has responded claiming that, based upon information available to it during drilling, its actions were reasonable and prudent, and that the sole cause of the well loss was unforeseeable. The record presents unresolved factual issues, and a hearing before an Administrative Law Judge is ordered.

Chevron U.S.A. Inc., et al., 110 IBLA 216 (Aug. 23, 1989)

In order to meet the requirements for a Phase I bond release under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269 (1982), and 30 CFR 800.40(c)(1), the operator must show that he has completed the backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. Where the record on appeal is incomplete and discloses material issues of fact regarding compliance with the requirements for a Phase I bond release, the Board will refer the case to an Administrative Law Judge for hearing pursuant to 43 CFR 4.1286.

William Helton Pullen, Jr., et al., 112 IBLA 218 (Dec. 19, 1989)

Motions

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

Appeal of Pearson Machine Controls, Inc., IBCA-1959 (July 31, 1985) 92 I.D. 350



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedMotions--Continued

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

Appeal of Maxima Corp., IBCA-1828 (Sept. 10, 1985) 92 I.D. 378

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

Appeal of Quality Seeding, Inc., IBCA-2297 (July 21, 1987) 94 I.D. 368

No sanctions were imposed on the Government for its failure to comply with a discovery order where its failure was not shown to be willful or to have caused appellant substantial prejudice. Noted by the Board was the fact that throughout much of the period of time within which the Government was to respond to the discovery order, appellant had been either unwilling or unable to comply with requests of Government auditors for cost information pertaining to appellant's multiple claims and that scheduling the various appeals for hearing was dependent upon the requested information being furnished not only in regard to discovery but also with respect to the Government audit.

Appeal of Hardrives, Inc., IBCA-2375 (Oct. 14, 1988) 95 I.D. 215

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedMotions--Continued

A Government motion to dismiss an appeal for lack of jurisdiction over the claims asserted is denied where the Board finds on the basis of controlling precedents that under the Contract Disputes Act the Board has jurisdiction over an appeal from a default termination absent a monetary claim by the parties and that it is not precluded from exercising jurisdiction over such an appeal by the failure of the contracting officer to issue a requested final decision where the record shows that the contracting officer gave de facto consideration to the claims and in effect denied them.

Appeal of Philomath Timber Co., IBCA-2409 (Dec. 12, 1988) 95 I.D. 257

Notice of Appeal

Where a decision of a state office prematurely rejects an oil and gas lease offer before the expiration of a period of time granted to the offeror to submit various documents, the rejection effectively suspends the running of the time for compliance, and where an appeal is timely taken from such a premature rejection and the documents in question are submitted during the pendency of the appeal, the submission will be considered timely.

American Petrofina Co. of Texas, 85 IBLA 104 (Feb. 14, 1985)

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedNotice of Appeal--Continued

had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985)<sup>92</sup> I.D. 109

Where an oil and gas lease offeror is notified he is allowed 30 days to execute restrictive stipulations as a condition to issuance of an oil and gas lease by the Department and is informed that failure to do so will result in rejection of the offer, there is no right to appeal that notice. It is not a final Departmental decision from which an appeal may be taken.

James M. Chudnow, Laurent A. Giesbert, Jean-Christophe Giesbert, 89 IBLA 361 (Nov. 20, 1985)

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedNotice of Appeal--Continued

actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987)<sup>94</sup> I.D. 132

If an appellant fails to tender the first year's rental and filing fee when appealing from a decision that a simultaneous oil and gas lease application is unacceptable, the appeal will be dismissed for failure to comply with 43 CFR 3112.3(h). If, however, the first year's rental and filing fee have previously been tendered, and have not been refunded at the time of filing a notice of appeal, the previous submittal will suffice.

Miriam Z. Grynberg, 99 IBLA 373 (Nov. 9, 1987)

In the absence of regulations specifically delineating how service of an invoice by MMS is effectuated, a payor engaged in a business relationship with MMS may specify a particular office or official to whom bills for collection should be directed. Service of an MMS bill for collection is not perfected until receipt by the official previously designated by the payor as the official to whom such notices should be directed.

Coastal Oil & Gas Corp., 106 IBLA 90 (Dec. 13, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedNotice of Appeal--Continued

Proper application of the Department's rules of practice requires an affirmative showing that a representative of a named appellant is qualified and authorized to represent any other purported appellant or appellants, if single representation for multiple parties is intended.

The Wilderness Society, 109 IBLA 175 (June 9, 1989)

Reconsideration

The Board's principal decision, which denied claims for constructive changes and costs of extended performance for failure to sustain the burden of proving the claims, is now affirmed after oral argument. Further review of the record confirms that the documentary evidence, the testimony at the hearing, and legal arguments fail to show liability of the Government for appellant's excess costs and extended performance.

Appeal of Kirkpatrick Div., Paul N. Howard Co., IBCA-1520-10-81 (Mar. 5, 1985)

The Board of Indian Appeals will not consider an issue in a petition for reconsideration which was not timely raised and considered below.

Norman M. Crooks v. Area Director, Minneapolis Area Office, Bureau of Indian Affairs, 14 IBIA 271 (Sept. 30, 1986)

A petition for reconsideration based on arguments already considered by the Board of Indian Appeals in its initial decision does not demonstrate extraordinary circumstances warranting reconsideration under 43 CFR 4.315.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 271 (Aug. 19, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedReconsideration--Continued

By regulation effective July 6, 1987, a petition for reconsideration of a Board of Land Appeals decision involving a subject matter other than surface mining must be filed within 60 days after the date of such a decision. Petitions for reconsideration of such decisions issued prior to July 6, 1987, must have been filed on or before Sept. 7, 1987.

Fisher De Fisher, Fisher Internat'l Inc. (On Reconsideration), 101 IBLA 212 (Feb. 26, 1988)

Where in a motion for reconsideration counsel fails to apprise the Board of any significant newly discovered evidence or evidence not duly considered in the course of rendering the principal decision, the motion will be denied.

Appeal of Marlene Deen d.b.a. M. D. Activities, IBCA-2113 (Mar. 8, 1988)

A petition for reconsideration may be granted only in extraordinary circumstances where good cause is shown therefor. Evidence of the existence of a market for cinders at the time of the withdrawal of such deposits from location in 1955 will not support reconsideration of a decision adjudicating the validity of a mining claim reached after an evidentiary hearing where the existence of such a market was recognized both by the Administrative Law Judge and the Board on review. Where the contest and the appeal were decided on the evidence that cinders from the claims at issue were not marketable, i.e., could not be extracted, removed, and marketed at a profit in 1955, reconsideration is not justified by evidence that there was a market for cinders at the time.

United States v. Aiken Builders Products (On Reconsideration), 102 IBLA 70 (Apr. 14, 1988)



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedReconsideration--Continued

Under 43 CFR 4.21(c), a request for reconsideration of a decision of the Board of Land Appeals was required to be filed promptly and could only be granted in extraordinary circumstances. A petition filed more than 6 months after issuance of a decision will be denied as untimely in the absence of a showing of justification for the delay in filing.

United States v. Norman A. Whittaker (On Reconsideration), 102 IBLA 162 (May 3, 1988)

In a petition for reconsideration of a Board decision closing roads within the King Range Wilderness Study Area to off-road vehicle use, BLM offered new evidence to show that it increased its law enforcement capability in the area and has purchased property in order to better control illegal off-road vehicle use. In consideration of the new evidence tending to show that BLM will be better able to control off-road traffic as a result, the Board's prior decision will be vacated in part where the evidence shows that these measures will protect against the impact of off-road vehicle use on the natural and cultural resources of the wilderness study area.

California Wilderness Coalition et al. (On Reconsideration), 105 IBLA 196 (Nov. 2, 1988)

Service on Adverse Party

"Adverse party." An "adverse party" to a case is one who will be disadvantaged if the agency decision is appealed and if the appellant prevails. A party who is determined by BLM to have priority for two oil and gas leases over another party will be disadvantaged if the latter prevails on an appeal to the Board of Land Appeals and should be named as an "adverse party" in the decision rejecting the latter's offer.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

The holder of a right-of-way on lands administered by the Bureau of Land Management is not adversely affected within the meaning of 43 CFR 4.410 by a decision transferring administrative authority over such lands to the Forest Service in the absence of any allegations of facts showing that the Forest Service has taken any adverse action with respect to the right-of-way at issue.

James W. Smith, 85 IBLA 237 (Mar. 4, 1985)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. Denial of a protest makes an individual a party to a case. Such denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally cognizable interest has been adversely affected by denial of the protest.

Donald Pay, 85 IBLA 283 (Mar. 13, 1985)

Where, on appeal from a denial of a protest, an appellant fails to make any showing as to how its interests are adversely affected by the denial of the protest, and none is apparent, such an appellant will be deemed to lack standing, and the appeal will be dismissed.

Save Our ecoSystems, Inc., et al., 85 IBLA 300 (Mar. 15, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

Under 43 CFR 4.410, a party to a case who is adversely affected by a BLM decision is properly recognized as having standing to appeal to the Board of Land Appeals.

Kenai Natives Ass'n, Inc., 87 IBLA 58 (May 28, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

In order for an association to have standing to bring an appeal in its own right, it must show that the decision being appealed adversely affects its enjoyment of a legally protected interest.

In order for an association to have standing to bring an appeal as a representative of its members, it must show that: (1) its members would have standing to sue in their own right, (2) the association's stated purposes make it a suitable proponent of its members' interests, and (3) the issues to be resolved do not require the individual participation of the members.

Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary--Indian Affairs (Operations), 13 IBIA 276 (Oct. 10, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

Fred J. Schikora, 89 IBLA 251 (Oct. 31, 1985)

Eugene M. Witt, 107 IBLA 229 (Feb. 21, 1989)

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds. /

Eugene M. Witt, 90 IBLA 265 (Jan. 31, 1986)

While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision approving a Native allotment application under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest for procedural reasons.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

The intent of the regulations limiting standing to appeal to a party to the case is to afford a rational framework for administrative decisionmaking on the assumption that the initial decisionmaker will have had the benefit of the input of such a party in reaching its decision. Where a party has actively participated in the consideration of an inventory unit for eligibility as a wilderness study area has requested in writing the opportunity to comment on applications for permit

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

to drill (APD's) filed for lands within the unit, and has been recognized by the Bureau of Land Management as a party wishing to have input in the process of adjudicating APD's filed for lands within the unit, it is entitled to notice of the filing of those APD's, and it will be recognized as a party to the case on appeal of decisions granting APD's within the unit.

Utah Wilderness Ass'n, 91 IBLA 124 (Mar. 19, 1986)

A BLM decision advising an applicant for a wind energy project of a perceived defect in his application and allowing 30 days to cure the deficiency is interlocutory in nature.

Kenneth W. Bosley, Westwind Electric, Inc., 91 IBLA 172 (Mar. 28, 1986)

A County Board of Commissioners lacks standing to appeal the terms of a proposed land sale where the alleged injury is to adjoining landowners who have grazing privileges on the land to be sold. The doctrine of parens patriae will not support a finding of standing in a state or local government body where no harm to state or local interests has been established apart from the injury to the individuals affected.

Blaine County Board of Comm'rs, 93 IBLA 155 (July 31, 1986)

Where the appellants have raised material issues of fact regarding a Bureau of Indian Affairs decision to issue a certificate of eligibility to a Native group which has selected land pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), the matter will be referred for a hearing before an Administrative Law

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

Judge and appellants will have the burden of establishing by a preponderance of the evidence that the eligibility determination is in error.

Minchumina Homeowners Ass'n et al., 93 IBLA 169 (Aug. 15, 1986)

Where a person does not allege and the record does not show he is a party having an interest adversely affected by a BLM decision, that person has no right to appeal and his appeal will be dismissed.

Mark S. Altman, 93 IBLA 265 (Aug. 28, 1986)

Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

Franklin Real Estate Co., 93 IBLA 272 (Aug. 29, 1986)

A "protest" under the provisions of 43 CFR 4.450-2 only lies where an individual objects to actions which are "proposed to be taken in any proceeding before" BLM. Absent such conditions, an objection by an individual does not necessarily establish that he or she is a "party to the case" within the meaning of 43 CFR 4.410 for the purposes of establishing standing to appeal.

In order for an individual to establish standing to appeal under 43 CFR 4.410, the individual must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR



# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Standing\_to Appeal--Continued

1610.5-2. To the extent, however, that the method of sale or the procedures used in conducting the sale are challenged, such matters are properly subject to appeal under 43 CFR 4.410.

George Schultz, 94 IBLA 173 (Oct. 29, 1986)

The jurisdiction of the Board of Land Appeals extends to appeals from decisions of Departmental officials regarding the disposition of minerals on public domain and acquired lands pursuant to statutory authority and the regulations promulgated thereunder. As a general rule, this Board has no authority to entertain a claim under the common law of contracts for damages for contract breach and an appeal to this Board predicated on such a ground is properly dismissed for lack of jurisdiction.

Exxon Corp., 95 IBLA 374 (Feb. 18, 1987)

One who is a mere trespasser upon land without claim or color of right does not possess the legally cognizable interest necessary for standing to appeal from a decision granting a conflicting Native allotment application.

James M. Wright, Butch L. Loper, 95 IBLA 387 (Feb. 24, 1987)

Regulation 43 CFR 4.410, setting forth the standard regarding who may appeal to the Board of Land Appeals, contains two separate and discrete prerequisites: (1) that appellant be a party to the case, and (2) that appellant be adversely affected by the decision on appeal. An appeal by a stockholder of a corporation is properly dismissed for lack of standing where the issue raised by appellant is the ownership of the corporation and the decision does not purport to adjudicate that issue.

Greg Williams, 98 IBLA 303 (July 29, 1987)

# RULES OF PRACTICE--Continued

## APPEALS--Continued

### Standing\_to Appeal--Continued

A party has standing to appeal a Department decision relating to land selections under the Alaska Native Claims Settlement Act, as amended, if the party claims a property interest in land affected by the decision, such as the right to use an existing right-of-way pursuant to a right-of-way use agreement.

City of Tanana, Tozitna Ltd., 98 IBLA 378 (Aug. 4, 1987)

Under 43 CFR 4.410(a), there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Under 43 CFR 4.410, standing to appeal is limited to a party to the case adversely affected by the decision appealed from. A party who expresses no intention to purchase an isolated tract of Federal land by submitting a competitive bid on the tract lacks standing to appeal the manner in which the sale is conducted.

Kenneth W. Bosley, 101 IBLA 52 (Jan. 26, 1988)

Although a person who files a protest to a proposed direct sale of public land becomes a party to a case within the meaning of 43 CFR 4.410 when the protest is denied and a timely appeal is filed, in order to maintain an appeal, the person must show an

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

interest which has been adversely affected by the decision.

Kenneth W. Bosley, 102 IBLA 235 (May 19, 1988)

One who has not participated in the decision-making process prior to a BLM decision concerning action affecting closure of a public right-of-way is not a "party to a case" within the meaning of 43 CFR 4.410(a). Such a person lacks standing to appeal, even though he may be adversely affected by a decision. To have standing to appeal, one must be both a party to a case and adversely affected by a decision.

Edwin H. Marston, 103 IBLA 40 (June 23, 1988)

Where BLM has approved the assignment of a wind park right-of-way subject to execution of new authorized user agreements with existing authorized users who have the right to use sites within the right-of-way for construction of wind turbine generators, such users have standing to appeal from a subsequent BLM decision issued to the right-of-way holder ordering removal of all generators on the right-of-way.

Storm Master Owners et al., 103 IBLA 162 (July 21, 1988)

An appeal is ordinarily dismissed as moot where, as a result of events occurring after the appeal is filed (e.g., withdrawal of the application at issue), there is no effective relief which the Board can afford to the appellant.

The Sierra Club et al., 104 IBLA 17 (Aug. 17, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

In order for an individual or organization to establish standing to appeal under 43 CFR 4.410, the individual or organization must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

Where, on appeal from a denial of a protest, an appellant fails to make an adequate showing how any legally cognizable interest has been adversely affected by the denial of the protest, such an appellant will be deemed to lack standing to appeal and the appeal will be dismissed.

Colorado Open Space Council, Sierra Club, 109 IBLA 274 (June 20, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

A group is not entitled to personal notice of all planned actions affecting public lands in Nevada simply because it has asserted a general interest in natural resource development in the State.

To obtain standing for review by the Board of Land Appeals a party must have participated in Bureau of Land Management decisionmaking prior to issuance of the decision sought to be reviewed. Even though a group may

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStanding to Appeal--Continued

be adversely affected by decisionmaking, it lacks standing to appeal if it is not a party to the case.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

A mining claimant has standing to appeal from decisions declaring his claims invalid.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982), is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. An appeal of the decision to sell a tract of land, as distinguished from an appeal of the method of sale or the procedures used in conducting the sale, is properly dismissed by the Board for lack of jurisdiction.

Idaho Dept. of Fish & Game, 112 IBLA 72 (Nov. 22, 1989)

Statement of Reasons

A statement of reasons in support of an appeal which does not point out affirmatively in what respect the decision appealed from is in error does not meet the requirements of the Department's rules of practice and the appeal may be dismissed.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStatement of Reasons--Continued

A statement of reasons for an appeal that does not point out affirmatively why the decision appealed from is in error does not meet the requirements of the Department's rules of practice and may be dismissed. Conclusory allegations of error, standing alone, do not suffice to point out error.

United States v. Fletcher De Fisher et al., 92 IBLA 226 (June 24, 1986)

Don G. Carpenter, 94 IBLA 7 (Sept. 18, 1986)

Andre C. Capella, 94 IBLA 181 (Oct. 29, 1986)

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250 (Aug. 26, 1986)

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

Add-Ventures, Ltd., 95 IBLA 44 (Dec. 19, 1986)

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered on its own merits.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedStatement of Reasons--Continued

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

If an appellant's notice of appeal did not include a statement of reasons for the appeal, under 43 CFR 4.412(a), the appellant must file such a statement with the Board of Land Appeals within 30 days after the notice of appeal was filed. However, under 43 CFR 4.22(f), the Board may extend the time for filing a statement of reasons. Under 43 CFR 4.402(a), failure to file the statement of reasons within the time allowed (either by 43 CFR 4.412(a), or by the Board in an order granting an extension) subjects the appeal to summary dismissal. Where no statement of reasons is ever filed and no reason is offered for the failure to file, the appeal is properly dismissed.

Robert L. True (d.b.a. Comanche Enterprises), Petroleum Research Corp., et al., SATELLITE 8303116, 101 IBLA 320 (Mar. 17, 1988)

Where an MMS bill for collection demanding interest on late payments of royalties is challenged by the royalty payor in an appeal to the Director, MMS, solely on the basis that interest was assessed from an improper date, resulting in an overcharge, thereby acquiescing in MMS' authority to assess interest, the Board of Land Appeals, in a subsequent appeal of the Director's decision by that royalty payor, may decline to entertain arguments directed to MMS' authority to assess interest.

ANR Production Co., 108 IBLA 387 (May 22, 1989)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely Filing

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a contracting officer's final decision is dismissed as untimely.

Appeal of William Cargile Contractor, Inc., IBCA-1787-3-84 (Jan. 8, 1985) 92 I.D. 53

Where a coal lessee is notified of the terms and conditions of the coal lease upon modification and is informed of the effective date assigned to the lease, such lessee must timely object or thereafter be barred from arguing the propriety of the modified lease's terms and conditions.

AMCA Coal Leasing, Inc., 86 IBLA 21 (Mar. 29, 1985)

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Oscar Mineral Group #3, 87 IBLA 48 (May 23, 1985)

The characterization of a submission as an appeal or request for reconsideration is not dispositive of how it should be treated. Even though an individual has not characterized a submission as an "appeal," where the effect of such submission is to challenge either the conclusion or the factual predicates of an adverse decision, it should be treated as an appeal.

Buck Wilson, 89 IBLA 143 (Oct. 1, 1985)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

Constructive service of a Bureau of Land Management decision sent by certified mail to an applicant's address of record is made when the post office returns the decision to the Bureau stamped "unclaimed." The 30-day period for filing a notice of appeal from the decision commences at that time, and is not tolled, extended, or the constructive service vitiated, by actual receipt of the decision thereafter.

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

A person who wishes to appeal from a determination that an oil and gas lease has terminated by operation of law for failure to submit the rental amount due must file a notice of appeal within 30 days after the date of service of the determination. If an appellant fails to file a timely notice of appeal in accordance with 43 CFR 4.411, the issue of termination will not be considered in an appeal from a subsequent decision denying petition for reinstatement.

PRM Exploration Co., 90 IBLA 63 (Dec. 10, 1985)  
92 I.D. 617

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional and failure to file an appeal within the time allowed requires its dismissal.

An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

Mobil Oil Exploration & Producing Southeast, Inc.,  
90 IBLA 173 (Jan. 21, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

Under the express terms of 43 CFR 4.411(a), a person who wishes to appeal a decision to the Board of Land Appeals must file his notice of appeal in the office of the officer who made the decision (not the Board). This requirement is strictly enforced. Thus, where a notice of appeal from a decision by a BLM state office is filed with a district office of BLM, an appeal is not initiated, and, if no other notice is timely filed in the correct office, the appeal must be dismissed.

Eklutna, Inc., 90 IBLA 196 (Jan. 30, 1986)

A notice of appeal must be filed within the time limits provided in 43 CFR 4.411(a). Failure to file an appeal within the time allowed requires dismissal of the appeal.

B. L. & Norma Jean Newman et al., 92 IBLA 314 (June 26, 1986)

The Board will dismiss an appeal challenging a Native group eligibility determination by the Bureau of Indian Affairs made pursuant to sec. 14(h)(2) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(2) (1982), where the appeal was filed more than 30 days after the appellant received notice of the determination.

Minchumina Homeowners Ass'n et al., 93 IBLA 169  
(Aug. 15, 1986)

The failure to file a statement of reasons merely subjects an appeal to summary dismissal. It is within the Board's discretion to allow late filing of a statement of reasons in appropriate circumstances.

Mendas Cha-ag Native Corp., Troxell Hebert, 93 IBLA 250  
(Aug. 26, 1986)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

Where a decision to assess royalty on vented natural gas fails to specify the extent of the lessee's liability and indicates it will be followed by a specific billing for the amount assessed, it is not a "final" appealable decision and a timely appeal from the billing will preserve the issue of the extent of the liability for vented gas.

F. Howard Walsh, Jr., Mae Lamar Davis & Newton Lamar,  
93 IBLA 297 (Sept. 9, 1986)

A decision is constructively served on the date it is returned to BLM by the Postal Service stamped "unknown." The period for filing a notice of appeal from the decision begins on that date.

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

TCG May 1983, 94 IBLA 22 (Sept. 23, 1986)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.  
Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

A motion to dismiss an appeal on the grounds that the appellant failed to file a timely notice of appeal under 43 CFR 4.411(a) will be denied when the notice of appeal, although incorrectly styled a "protest," was filed in the office of the officer who made the decision within 30 days of service of the decision sought to be reviewed.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons, or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

James C. Mackey, 96 IBLA 356 (Apr. 10, 1987) 94 I.D. 132

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark



RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

Lyman J. Ipsen et al., 96 IBLA 398 (Apr. 14, 1987)

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 4.411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

Ahtna, Inc., et al., 100 IBLA 7 (Nov. 13, 1987)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

Under 30 CFR 775.11(a), a request for a hearing must be filed within 30 days after an applicant or permittee is notified of OSMRE's final decision on an application for a permit revision. The timely filing of a request for a hearing is jurisdictional and failure to file the request within the time allowed requires dismissal of the proceedings.

Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement & Peabody Coal Co., 103 IBLA 44 (June 27, 1988)

The Bureau of Land Management properly dismissed a protest which challenged a completed action and was filed nearly 3 years after the party filing the protest received notice of the action.

Devon Energy Corp., 104 IBLA 90 (Aug. 31, 1988)

Any affected person who desires to challenge the issuance or denial of a cultural resource use permit must follow the procedures embodied in 43 CFR 7.36. Until the review process set forth in this regulation has been exhausted, and BLM has had the opportunity to consider and rule on an appellant's challenge in the first instance, the matter is not ripe for review by this Board.

James C. Mackey, 104 IBLA 393 (Oct. 4, 1988)

The failure to file a timely notice of appeal under 43 CFR 4.411(c) deprives the Board of jurisdiction over the subject matter of the appeal. Where an individual who has appealed one decision issued by BLM attempts to raise matters that were finally decided in an earlier decision, which decision was not appealed, the appeal is not timely as to those prior matters which could have been appealed earlier.

The Wilderness Society, 106 IBLA 46 (Dec. 8, 1988)

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

An administrative appeal must be filed within 30 days of receipt of the decision from which an appeal is taken. 43 CFR 411. The timely filing of an administrative appeal is jurisdictional and the failure to file timely mandates dismissal of the appeal.

D. R. Johnson Lumber Co., 106 IBLA 379 (Jan. 19, 1989)

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989).

A party who is adversely affected by a decision of an officer of BLM may appeal that decision to the Board of Land Appeals. However, a notice of appeal must be filed with BLM within 30 days after the date of service. The timely filing of a notice of appeal is jurisdictional. The failure to file within the time allowed renders the decision final and requires dismissal of the appeal.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing

RULES OF PRACTICE--ContinuedAPPEALS--ContinuedTimely\_Filing--Continued

of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

Departmental regulation 43 CFR 4.411 provides that a person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service. If a decision is published in the Federal Register, a person not served with the decision must transmit a notice of appeal in time for it to be filed within 30 days after the date of publication. If a decision is not published in the Federal Register and an appeal is brought by a person who is not served with the decision, the appellant must establish that he was entitled to personal service of the decision or that his appeal was filed within 30 days after service of the decision upon the party or parties of record.

Lew Landers, 109 IBLA 391 (June 26, 1989)

An appeal will not be dismissed as untimely when the record fails to establish that the decision was served upon the appellant more than 30 days prior to the date the notice of appeal was filed. The period for filing a notice of appeal is measured from the "date of service" of a decision rather than the date the decision is mailed. In the absence of a certified return receipt card or other evidence establishing when the decision was served, the appeal cannot be dismissed as untimely.

Craig C. Downer, 111 IBLA 332 (Oct. 31, 1989)

RULES OF PRACTICE--ContinuedEVIDENCE

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

John R. Wellborn, Clara Joe Wellborn, 87 IBLA 20 (May 21, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, the presumption is not overcome by submission of a statement that a document can be rebutted only by probative evidence.

James Boatman, 87 IBLA 31 (May 22, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, a statement that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the document in the file.

Larry C. Hoffman, 87 IBLA 225 (June 19, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed.

Howard Gates, 87 IBLA 261 (June 21, 1985)

RULES OF PRACTICE--ContinuedEVIDENCE--Continued

Fern L. Evans, Gary L. Carter, 88 IBLA 45 (July 10, 1985)

Homestake Oil & Gas Co., 95 IBLA 61 (Dec. 19, 1986)

The legal presumption of regularity that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an uncorroborated statement that an affidavit of assessment work was timely filed with the proper BLM office is insufficient to overcome that presumption.

Ronald Edwards, 87 IBLA 367 (June 27, 1985)

Jack Bolke, Paul Pilch, 88 IBLA 58 (July 17, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally sufficient documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by an uncorroborated statement that a document was mailed.

George W. Wagner, Hazel T. Wagner, 88 IBLA 117 (July 31, 1985)

Where on appeal BLM challenges findings made by an Administrative Law Judge on grounds that his findings concerning credibility of witnesses are inadequate to justify the decision as announced, the Board of Land Appeals will examine the record to determine whether, on the basis of all evidence, the findings made by the fact-finder are supported by credible testimony.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)



RULES OF PRACTICE--ContinuedEVIDENCE--Continued

The legal presumption that administrative officials have properly discharged their official duties and not lost legally significant documents filed with them may be rebutted by sufficient probative evidence that a particular document was not only transmitted but received by the proper office. When it is asserted that a particular document is one of multiple documents filed with BLM, proving receipt of some of the multiple documents does not prove receipt of the unaccounted-for document.

Neal R. Foster et al., 88 IBLA 296 (Sept. 13, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an allegation that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

Ralph C. Memmott, 88 IBLA 372 (Sept. 27, 1985)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary.

Norman A. Whittaker, 89 IBLA 224 (Oct. 28, 1985)

John H. Blackwood, 89 IBLA 379 (Nov. 22, 1985)

In a case involving a dispute over the amount of soil-cement slope protection placed on the embankment portion of a dam in which the appellant relies upon a survey made by a professional land surveyor and the BIA upon a survey performed by the project engineer (a registered professional engineer), the Board accepts the BIA survey as determinative of the quantity of soil-cement placed on the embankment where it finds (i) the BIA survey had been performed at an earlier time when conditions prevailing were more conducive to

RULES OF PRACTICE--ContinuedEVIDENCE--Continued

accurate measurements being taken and (ii) the records maintained with respect to the BIA survey appeared to be free of the internal inconsistencies shown to be present in the survey records of the licensed land surveyor.

Riverside General Construction Co., Inc., IBCA-1603-7-82 (Feb. 13, 1986)  
93 I.D. 27

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, affidavits that copies of signed oil and gas lease offers were timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

David A. Gitlitz, 95 IBLA 221 (Jan. 15, 1987)

The presumption of regularity supports the acts of public officers and, in the absence of clear evidence to the contrary, they are presumed to have properly discharged their official duties.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. A copy of a proof of labor with the BLM serial number marked in handwriting, coupled with a statement that the original and the copy were hand delivered to BLM and a written acknowledgement by a BLM employee that the handwriting is her own, are sufficient evidence to establish that the proof of labor was timely filed at the proper BLM office.

Milton E. Kutil, 104 IBLA 396 (Oct. 5, 1988)

RULES OF PRACTICE--ContinuedEVIDENCE--Continued

No sanctions were imposed on the Government for its failure to comply with a discovery order where its failure was not shown to be willful or to have caused appellant substantial prejudice. Noted by the Board was the fact that throughout much of the period of time within which the Government was to respond to the discovery order, appellant had been either unwilling or unable to comply with requests of Government auditors for cost information pertaining to appellant's multiple claims and that scheduling the various appeals for hearing was dependent upon the requested information being furnished not only in regard to discovery but also with respect to the Government audit.

Appeal of Hardrives, Inc., IBCA-2375 (Oct. 14, 1988)  
95 I.D. 215

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the finding is supported on the record by geologic evidence and the analysis of the Department's technical experts, the determination will not be altered in the absence of a showing of error by a preponderance of the evidence.

Winston L. Thornton et al., 106 IBLA 15 (Nov. 30, 1988)

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced documents filed with them is rebuttable by probative evidence to the contrary. The presumption is not overcome by a statement, without corroborating evidence, that a document was mailed, or by evidence that the claimant timely recorded a copy with the local recording office.

Donald G. Sterner, 109 IBLA 76 (May 30, 1989)

Daniel D. Draper, 109 IBLA 85 (May 31, 1989)

RULES OF PRACTICE--ContinuedEVIDENCE--Continued

A holder of a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of establishing that the determination is in error. Where the record establishes that the Secretary's technical expert has made a reasoned analysis of the available geological data, the Secretary is entitled to rely upon his expert's professional opinion, absent a showing of error by a preponderance of the evidence.

John R. Stamper, BHP Petroleum (Americas), Inc.,  
110 IBLA 130 (Aug. 9, 1989)

A holder of a noncompetitive oil and gas lease who challenges a determination that her leased lands are within the known geologic structure of a producing oil or gas field has the burden of proving that determination to be correct.

Where the Secretary's technical expert has made a reasoned analysis of available geologic data, the Secretary is entitled to rely on that opinion, absent a showing of error by a preponderance of the evidence.

Celeste C. Grynberg, 112 IBLA 13 (Nov. 14, 1989)

GOVERNMENT CONTESTS

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof but begins only upon payment for the land. Where appellant

RULES OF PRACTICE--Continued

## GOVERNMENT CONTESTS--Continued

had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

Failure by the Government to deliver a notice of contest action brought against a homestead entry within 30 days of commencement of action does not affect the validity of the complaint where notice of the action is given to the entryman in a reasonably timely manner.

Terry L. Wilson, 85 IBLA 206 (Feb. 28, 1985) 92 I.D. 109

Where conflicting evidence exists concerning a Native allotment applicant's use and occupancy of the land claimed which raises material factual issues, the Bureau of Land Management should initiate a Government contest so that those issues can be resolved at a hearing.

Pedro Bay Corp., 88 IBLA 349 (Sept. 24, 1985)

The final ruling of a Government contest of unpatented mining claims which are the subject of amended locations where the claims were declared null and void for lack of discovery of a valuable mineral deposit, which declaration was sustained on appeal, will not be applied to amended locations where the record shows that these amended locations were specifically excluded from the contest action.

Jon Zimmers, 90 IBLA 106 (Dec. 23, 1985)

BLM may properly dismiss, with prejudice, a patent application with respect to association oil shale placer mining claims where such claims were properly declared null and void in earlier Government contest proceedings when the applicant's predecessors-in-interest failed to timely file answers to successive complaints, which together resulted in service by registered mail upon all of the co-owners of the

RULES OF PRACTICE--Continued

## GOVERNMENT CONTESTS--Continued

claims. It was not necessary that the interests of all of the contestees be declared null and void in a single proceeding.

The owner of an oil shale placer mining claim will be regarded as having been properly served with notice of a Government contest complaint when that person actually received a copy of the complaint challenging the validity of the claim, even though there was a minor error in the name of the contestee on the complaint and a copy of the complaint was not sent to the post office nearest the claim, in accordance with the applicable rules, paragraph 6 of Circular No. 460, 44 L.D. 573 (1916).

Assuming the applicability of rule 8 of the Rules of Practice (51 L.D. 549 (1926)) to Government contests, such a contest challenging the validity of an oil shale placer mining claim will not be held to have abated pursuant to that rule where the Government failed to serve one of the co-owners of the claim named in the contest complaint. At best, the contest will be deemed to have abated only as to the unserved contestee.

Union Oil Co. of California, 98 IBLA 37 (June 3, 1987)

The motivation of a Government agency initiating a contest against mining claims is irrelevant. The fact that such contest challenges the validity of certain mining claims and not of others in the same general area does not constitute a denial of due process. The Board of Land Appeals cannot abrogate its responsibility to determine the validity of mining claims when that issue is presented upon appeal. When that issue is properly presented, mining claims are properly declared null and void upon a showing of lack of discovery of a valuable mineral deposit within the claims.

United States v. Jerry E. Franklin, 99 IBLA 120 (Sept. 22, 1987)



RULES OF PRACTICE--ContinuedGOVERNMENT CONTESTS--Continued

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

HEARINGS

Where the proponent of a land exchange raises substantial questions concerning the accuracy of a BLM appraisal of the value of the selected land, including the use of appropriate comparable sales, the need to apply a discount to financed transactions and the extent of adjustments to assure comparability for the cost of bringing in utilities and modifying topography, the case will be referred to the Hearings Division for a fact-finding hearing.

Fallon Ice & Cold Storage Co., Willow Lane Corp., 85 IBLA 224 (Feb. 28, 1985)

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of the matter. A hearing is not necessary where the dispute does not involve facts, but involves the proper application and interpretation of those facts, and the Bureau of Land Management properly reviewed the same information submitted to this Board.

Woods Petroleum Co., 86 IBLA 46 (Apr. 10, 1985)

RULES OF PRACTICE--ContinuedHEARINGS--Continued

Due process does not require notice and a prior right to be heard in all cases in which there is an alleged impairment of property rights so long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Davis Exploration, 112 IBLA 254 (Dec. 28, 1989)

Where there are disputed issues of fact which will be determinative of the legal issues presented, the Board has the authority, in its discretion, to order a hearing on the matter before an administrative law judge pursuant to 43 CFR 4.415.

E. B. Brooks, Jr., 92 IBLA 282 (June 25, 1986)

Where there are disputed facts determinative of the legal issues posed therefrom, this Board has the discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Edward L. Johnson, 93 IBLA 391 (Sept. 18, 1986)

Where a party fails to appear or participate in a hearing as scheduled, the merits of the case may be reached and decided on the basis of the record completed at the hearing, despite the absence of evidence in support of the party's case.

United States v. King Koenig et al., 99 IBLA 397 (Nov. 10, 1987)

RULES OF PRACTICE--ContinuedHEARINGS--Continued

A hearing is not necessary in the absence of allegations of a material issue of fact, which, if proven, would alter the disposition of the appeal.

Marie M. Bunn, 100 IBLA 1 (Nov. 12, 1987)

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

Where a petition for review of a proposed civil penalty is filed and full prepayment is made within the time period prescribed by 43 CFR 4.1141(b) in the Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia, the fact that the petition is not

RULES OF PRACTICE--ContinuedHEARINGS--Continued

"accompanied by" the prepayment should not result in dismissal of the petition.

Fresa Construction Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229 (Feb. 26, 1988)

In accordance with 43 U.S.C. § 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

San Juan County, 102 IBLA 155 (Apr. 29, 1988) 95 I.D. 61

Where OSMRE issues a notice of violation and more than 5 years later during a hearing held pursuant to the filing of a petition for review of a civil penalty based on that notice and a subsequent cessation order, the permittee raises for the first time lack of service of the notice of violation, that issue will be considered not timely raised. By failing to raise the issue in its petition or an amendment thereto, the permittee waived its opportunity subsequently to challenge service.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

RULES OF PRACTICE--ContinuedHEARINGS--Continued

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1982), a Native allotment applicant may amend the land description contained in the application if the description designated land other than that which the applicant intended to claim and the new description describes the land originally intended to be claimed. Where the record presents disputed facts concerning whether applicant's new description describes the land originally intended to be claimed, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals for a hearing on the matter pursuant to 43 CFR 4.415.

Daniel Roehl, 103 IBLA 96 (July 12, 1988)

A request for a hearing will be granted only where there is a material issue of fact requiring resolution through the introduction of testimony or other evidence. In the absence of such an issue, no hearing is required.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

Upon a determination that production has ceased on an oil and gas lease in its extended term by reason of such production because the well on the lease is no longer capable of production in paying quantities, the affected parties are entitled to notice and an opportunity to request a hearing on the issue of the productive capacity of the well where they have presented evidence raising an issue of fact regarding the status of the well.

Daymon D. Gilliland, 108 IBLA 144 (Apr. 5, 1989)

No hearing is required to determine whether an application for a Native allotment was timely filed with the Department when the record contains affidavits stating only that the application was mailed prior to the Dec. 18, 1971, deadline. The presumption of regularity, which supports the official acts of public officers in the discharge of their duties, must for reasons of public policy and under burden of proof

RULES OF PRACTICE--ContinuedHEARINGS--Continued

analysis be accorded priority over the presumption that documents properly mailed are duly delivered.

June I. Degnan (On Reconsideration), 111 IBLA 360 (Nov. 3, 1989)

PRIVATE CONTESTS

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Sandra Memmott, 88 IBLA 379 (Sept. 27, 1985)

BLM may properly dismiss a private contest complaint challenging the validity of a homestead entry in Alaska as moot where an independent basis for cancelling the entry, which is a matter of record with BLM, arises prior to expiration of the time for filing an answer to the complaint and BLM subsequently cancels the entry on that basis. In such circumstances, the contestant has not procured cancellation of the entry and, hence, is not entitled to a preference right under 43 U.S.C. § 185 (1970).

James L. Putman, 89 IBLA 242 (Oct. 29, 1985)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim because of a rival claimant's alleged failure to file the documents required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1982). A decision by BLM, written in response to a request by a rival claimant that claims be declared abandoned and void, and going



RULES OF PRACTICE--ContinuedPRIVATE CONTESTS--Continued

to the merits of the rival claimant's allegations may properly be vacated by this Board.

Sandra Memmott (On Reconsideration), 93 IBLA 113 (July 24, 1986)

Although BLM may properly declare mining claims abandoned on the basis of a state court decision on the rights of rival claimants to possession, it should not do so until the state appellate court review process is complete.

Alvin L. Kile, Leslie L. Maxwell, 97 IBLA 6 (Apr. 17, 1987)

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988)  
95 I.D. 49

Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

Ira Wassillie, 103 IBLA 112 (July 19, 1988)

RULES OF PRACTICE--ContinuedPRIVATE CONTESTS--Continued

Summary dismissal of a private contest against an Alaska headquarters site cannot be sustained on grounds the contestee was not served with the contest complaint where, on appeal, the contestant produces proof that the complaint was served in conformity to 43 CFR 4.450-5.

Pursuant to 43 CFR 4.450-1, a private contest may not be brought for reasons appearing of record with the Bureau of Land Management. Where all the matters alleged by a contest complaint appear on agency records at the time the complaint is filed, it is subject to summary dismissal.

Kim M. Cook v. Mary Frances DeHart Buren, 106 IBLA 294 (Jan. 5, 1989)

An Alaska Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others. In a private contest initiated by a Native corporation following a BLM decision holding the Native allotment for approval, the Native corporation carries the burden of showing by a preponderance of the evidence that the Native allotment application is not valid.

Kootznووو, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (June 8, 1989)

The failure to file a timely appeal from a decision by an Administrative Law Judge in a private contest declaring mining claims invalid precludes the Board from considering the contestee's appeal from the denial of a later protest to the extent that the appeal involves issues resolved in the contest decision.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

## RULES OF PRACTICE--Continued

### PRIVATE CONTESTS--Continued

When the Board conducts de novo review of a decision of an Administrative Law Judge who erroneously allocated the burden of proof in a private contest proceeding to the applicant for a Native allotment rather than to the contestant, the Board properly reviews the entire record to determine whether the applicant established by a preponderance of the evidence that he satisfactorily proved he was entitled to an allotment.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for this Department to decide whether one claimant has a better right to a claim than a rival claimant. Approval of a mining plan of operations is based upon a determination that such operations will not result in unnecessary or undue degradation of Federal lands, and not on a determination that the party submitting the plan of operations will be able to conduct the proposed operations without trespassing on lands held by others. Therefore, one seeking to prevent operations outlined in a plan of operations submitted to BLM because such operations allegedly would result in trespass should seek such relief in a court of competent jurisdiction.

Jurisdiction over disputes between rival mining claimants is reserved to the courts, and it is not for the Department to decide whether one claimant has a better right to a claim because the rival claimant has allegedly failed to file the document required under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

Rufus B. McIlroy, 111 IBLA 144 (Sept. 29, 1989)

### PROTESTS

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a

## RULES OF PRACTICE--Continued

### PROTESTS--Continued

party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

Sierra Club Legal Defense Fund, Inc. Natural Resources Defense Council, Inc. California Wilderness Coalition, 84 IBLA 311 (Jan. 7, 1985) 92 I.D. 37

In adjudicating a protest against an application for radio communications right-of-way, the Bureau of Land Management is required by 43 CFR 4.450-2 only to consider and decide matters which are proposed to be done. Where an application for right-of-way has already matured into a functioning use, a protest against the proposal upon which the use was initiated must be dismissed.

Willamette Logging Communications, Inc. Springfield Radio Communications, Inc., 86 IBLA 77 (Apr. 10, 1985)

A decision denying a protest of the contemplated issuance of noncompetitive geothermal resources leases will not be effective during the period of time in which the protestant adversely affected by the decision may file a notice of appeal, and leases issued during this time are subject to cancellation.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Where BLM denies a protest to a proposed private land exchange, it must inform the protestant of its right to appeal. The right of appeal is not dependent upon BLM's determination of whether the protestant claims ownership of public lands in the proposal or holds a valid existing contract, permit or lease for those lands. Denial of a protest makes the protestant a "party to a case" within the meaning of 43 CFR 4.410. Whether a party to a case has an interest which has been adversely affected by the BLM decision is a matter to be decided by the Board of Land Appeals on appeal.

Steinheimer Trust, 87 IBLA 308 (June 25, 1985)

RULES OF PRACTICE--ContinuedPROTESTS--Continued

A decision by BLM denying a request to amend an existing resource management plan or a management framework plan is not subject to appeal to the Board of Land Appeals. Although this situation is not expressly covered by the terms of 43 CFR 1610.5-2(a) (which allows administrative review of approval or amendment of resource management plans only via protests to the Director of BLM, whose decision is final for the Department), logic dictates denial of a request for an amendment of such a plan must follow the same avenue of review. It is distinguishable from actions on applications following classification or decisions implementing a management plan or amendment, which are appealable to this Board.

Harold E. Carrasco, Ray W. Carrasco, 90 IBLA 39 (Dec. 10, 1985)

Under certain circumstances a document styled as a protest is properly treated as an appeal. Thus, where prior to completion of a private exchange by BLM, the owner of the mineral interest in the private land involved therein requests that BLM acquire its interest and BLM proceeds to complete the exchange and subsequently deny the request, a protest filed by the owner should be treated by BLM as an appeal of its denial and the case file forwarded to the Board of Land Appeals.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

Randall J. Gerlach, 90 IBLA 338 (Feb. 26, 1986)

RULES OF PRACTICE--ContinuedPROTESTS--Continued

A "protest" under the provisions of 43 CFR 4.450-2 only lies where an individual objects to actions which are "proposed to be taken in any proceeding before" BLM. Absent such conditions, an objection by an individual does not necessarily establish that he or she is a "party to the case" within the meaning of 43 CFR 4.410 for the purposes of establishing standing to appeal.

George Schultz, 94 IBLA 173 (Oct. 29, 1986)

Where BLM issues a notice holding mining claims for rejection (that is, where BLM provides the claimant 30 days in which to supply certain information, failing in which his mining claims will be finally declared abandoned and void without further notice), the 30-day period during which an appeal may be initiated with the Board of Land Appeals does not commence until the expiration of the 30-day compliance period allowed by the notice. During the 30-day compliance period, BLM's decision is interlocutory, so that a notice of appeal filed during the compliance period is premature. BLM should treat a notice of appeal filed during the compliance period as a protest and then issue an appealable decision.

However, where a notice of appeal is filed prematurely from an interlocutory decision and the matter is forwarded to the Board of Land Appeals, the Board has discretion whether to remand the case to BLM to be treated as a protest or, instead, to adjudicate the merits of the matter. The Board will reach the merits where there is no practical benefit in remanding the case, such as where the appellant's statement of reasons to the Board makes it clear that he has no information to supply to BLM that will establish that his claims should not be declared void.

Robert C. LeFaivre, 95 IBLA 26 (Dec. 12, 1986)



## RULES OF PRACTICE--Continued

### PROTESTS--Continued

In adjudicating a 1984 protest against a 1939 cancellation of a homestead entry, BLM properly dismissed the protest. A protest, properly is an objection to a proposed action, and may not be used to challenge an action which has been completed.

Everett J. Johnson, 95 IBLA 136 (Jan. 12, 1987)

A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

State of Alaska, 95 IBLA 196 (Jan. 14, 1987)

A State protest against approval of a Native allotment application fails to state with sufficient specificity the facts upon which conclusions concerning public access are made so as to conform to provision of 43 U.S.C. § 1634(a)(5)(B) (1982), where the protest recites that the applied-for land is the site of an existing seaplane base, boat launch, and trail, when it appears none of the claimed improvements are located on the allotment. Since the State's protest does not describe the land claimed by the Native allotment applicant with specificity under such a circumstance, the allotment may be granted to the Native applicant, all else being regular.

There is no authority for the reservation of easements in Native allotments comparable to sec. 17(b) of ANCSA, 43 U.S.C. § 1616(b) (1982), governing reservations of easements in conveyances to Native corporations. An easement across Native corporation lands recognized pursuant to ANCSA may not constitute sufficient grounds for protest of a Native allotment under sec. 905 of ANILCA, 43 U.S.C. § 1634 (1982), where the record discloses the route of access reserved

## RULES OF PRACTICE--Continued

### PROTESTS--Continued

in the easement does not cross or abut the Native allotment parcel.

State of Alaska (Elliot R. Lind), 95 IBLA 346 (Feb. 4, 1987)

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

The Board will not dismiss as interlocutory an appeal from a BLM decision which held the appellant's oil and gas lease offers for rejection and required correction of a perceived regulatory defect, but instead will adjudicate the appeal where no useful purpose would be served by remanding the case to BLM.

Beard Oil Co., 97 IBLA 66 (Apr. 28, 1987)

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

RULES OF PRACTICE--ContinuedPROTESTS--Continued

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

Where an individual files an "appeal" with BLM of a notice of a proposed direct sale of certain public lands, that filing is not an appeal under 43 CFR 4.410; rather, it is a protest, which, under 43 CFR 4.450-2, is any objection to any action proposed to be taken by BLM.

An "appeal" of action proposed to be taken by BLM is a protest, and where that protest contains absolutely no reason for objection to the proposed action, BLM may summarily dismiss the protest. Where the protest is subsequently forwarded to the Board for review as an appeal, the "appeal" will be dismissed because to treat the protest as an appeal and to allow a protestant to present his objections to the proposed action for the first time on appeal would put the Board in the position of being the initial decisionmaker and would frustrate the Departmental framework for decisionmaking.

Kenneth W. Bosley, 99 IBLA 327 (Oct. 29, 1987)

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

RULES OF PRACTICE--ContinuedPROTESTS--Continued

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the mineral claimant's proposed activities on the patented lands.

William & Pearl Hayes, 101 IBLA 110 (Feb. 2, 1988)

Challenges to the approval or amendment of a resource management plan and its related environmental impact statement are accorded administrative review only in conformity with the protest procedures prescribed by 43 CFR Part 1600.

Headwaters, Inc., et al., 101 IBLA 234 (Feb. 29, 1988)

Although a person who files a protest to a proposed direct sale of public land becomes a party to a case within the meaning of 43 CFR 4.410 when the protest is denied and a timely appeal is filed, in order to maintain an appeal, the person must show an interest which has been adversely affected by the decision.

Kenneth W. Bosley, 102 IBLA 235 (May 19, 1988)

One who has not participated in the decision-making process prior to a BLM decision concerning action affecting closure of a public right-of-way is not a "party to a case" within the meaning of 43 CFR 4.410(a). Such a person lacks standing to appeal, even though he may be adversely affected by a decision. To have standing to appeal, one must be both a party to a case and adversely affected by a decision.

Edwin H. Marston, 103 IBLA 40 (June 23, 1988)

RULES OF PRACTICE--Continued

PROTESTS--Continued

A state protest against approval of a Native allotment application filed pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982), which identifies with specificity the fact relied upon to show an access route is in conflict with the allotment requires adjudication of the allotment pursuant to 43 U.S.C. § 1634(a)(5)(B) (1982).

State of Alaska (Elliot R. Lind) (On Reconsideration), 104 IBLA 12 (Aug. 17, 1988)

The Bureau of Land Management properly dismissed a protest which challenged a completed action and was filed nearly 3 years after the party filing the protest received notice of the action.

Devon Energy Corp., 104 IBLA 90 (Aug. 31, 1988)

Since, under 43 CFR 4.450-2, a protest is any objection to any action "proposed to be taken," a protest may not properly be filed where the action complained of has already taken place.

The Wilderness Society, 106 IBLA 46 (Dec. 8, 1988)

The mere assertion that mining claims were located while the land was closed to mineral entry, unsupported by probative evidence of that fact, provides an insufficient basis for the rejection of a mining plan of operations filed with respect to such claims.

Department of the Navy, 108 IBLA 334 (May 8, 1989)

Where BLM issued a record of decision determining to issue a natural gas pipeline right-of-way and therein provides for a "30 days comment period" and in a notice of its decision also informs interested parties that the decision is subject to appeal, the Board will entertain a timely appeal of the decision where the record shows

RULES OF PRACTICE--Continued

PROTESTS--Continued

that BLM clearly was issuing a decision ripe for administrative review and the reference to a public comment period was inadvertent and unintended.

Hoosier Environmental Council, 109 IBLA 160 (June 8, 1989)

A group that has not participated in agency decisionmaking prior to approval by BLM of a mining plan of operations is not a "party to a case" within the meaning of 43 CFR 4.410(a) for purposes of appeal.

The Wilderness Society, 110 IBLA 67 (July 20, 1989)

WITNESSES

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

Appeal of Volk Construction, Inc., IBCA-1419-1-81 et al. (June 30, 1987)  
94 I.D. 221

SCHOOL LANDS

(See also State Selections--if included in this Index.)

GENERALLY

The lost school sections within the Elk Hills Petroleum Reserve, now administered by the Secretary of Energy, originally were placed in the reserve by executive order, but were later the subject of specific Congressional legislation directing how they were to be administered and ratifying the executive action. As such, they are subject to a "withdrawal created by



SCHOOL LANDS--ContinuedGENERALLY--Continued

Act of Congress," and outside the authority of the Secretary of the Interior to revoke withdrawals.  
43 U.S.C. § 1714(j).

California Elk Hills Indemnity Selections, M-36950  
(Dec. 18, 1984) 92 I.D. 515

GRANTS OF LAND

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

INDEMNITY SELECTIONS

In lieu of school lands lost at statehood due to their mineral character and subsequent inclusion in the Elk Hills Petroleum Reserve, the State of California is entitled under 43 U.S.C. § 851, 852, and 870, to select other lands of equal acreage.

California Elk Hills Indemnity Selections, M-36950  
(Dec. 18, 1984) 92 I.D. 515

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

SCHOOL LANDS--ContinuedMINERAL LANDS

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988) 95 I.D. 49

SCRIP  
(See also Soldiers' Additional Homesteads--if included in this index.)

A forest lieu selection right is extinguished where the base land is reconveyed to the principal, i.e., the party who originally conveyed the land to the United States. The purported agent or attorney-in-fact of the principal has no rights thereafter against the United States, even if he recorded his power of attorney prior to the reconveyance. The United States is not required to determine the rights of various putative assignees asserting a selection right.

The Act of Aug. 18, 1894, 43 U.S.C. § 276 (1982), validates certain categories of soldiers' additional homestead certificates issued prior to Aug. 18, 1894. It does not validate certificates issued after that date, nor does it validate uncertificated soldiers' additional homestead rights.

When an assignee of a soldiers' additional homestead right presents an application to enter land pursuant to such right, the identity of the original assignor with the soldier and original homestead entryman must be established by the affidavits of two witnesses having personal knowledge of the facts, or, if such witnesses cannot be procured, a satisfactory reason must be given and other facts presented tending to establish such identity.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand),  
103 IBLA 316 (Aug. 5, 1988)

# SECRETARY OF THE INTERIOR--Continued

SECRETARY OF THE INTERIOR  
(See also Administrative Authority--if included in this Index.)

By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

Interim Ad Hoc Committee of the Karok Tribe v. Area Director, Sacramento Area Office, Bureau of Indian Affairs, 13 IBIA 76 (Jan. 8, 1985) 92 I.D. 46

BLM has the authority to decide whether to issue a noncompetitive geothermal resources lease pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for land within a national forest where the Forest Service has consented to leasing, and to impose additional stipulations, in order to protect environmental resources, not inconsistent with those prescribed by the Forest Service. Where BLM has expressly not exercised that authority, the case will be remanded for that purpose, including a consideration of whether BLM has properly provided for staged leasing, i.e., leasing subject to subsequent approval of specific development activities contingent on a finding that no environmentally unacceptable impact will occur.

Sierra Club, Oregon Chapter, 87 IBLA 1 (May 17, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Under 43 CFR 4.1, the Board of Land Appeals is empowered to consider and determine issues raised on appeal as fully and finally as might the Secretary. In considering the significance of actions taken by BLM, the Secretary is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors-in-interest. It necessarily follows that the Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

Peabody Coal Co., 93 IBLA 317 (Sept. 11, 1986) 93 I.D. 394

Although Federal oil and gas leasing is subject to extensive supervision by the Secretary of the Interior, and although the Secretary has broad discretion over whether or not to lease particular lands within the public domain, once he has granted a lease he may not derogate the rights acquired by the Federal lessee under the Mineral Leasing Act, 30 U.S.C. § 181 (1982), and the lease granted pursuant thereto.

Arnell Oil Co., 95 IBLA 311 (Jan. 30, 1987)

Under 43 CFR 4.1 and 43 CFR 4.1(b)(3), the Board of Land Appeals, as the authorized representative of the Secretary of the Interior with the authority to decide finally for the Department appeals concerning the use and disposition of public lands, is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by the Secretary's subordinates or predecessors in interest.

Northwest Alaskan Pipeline Co., 99 IBLA 201 (Oct. 13, 1987)

SECRETARY OF THE INTERIOR--Continued

The Secretary of the Interior is not estopped by the principles of res judicata or finality of administrative action from correcting, reversing, or overruling an erroneous decision by subordinates or predecessors in interest.

McKenzie County et al., 99 IBLA 264 (Oct. 20, 1987)

Although neither sec. 4 of the General Allotment Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), nor the Indian allotment regulations at 43 CFR Part 2530, specifically provide for the cancellation of a certificate of allotment, the Secretary of the Interior, as custodian of the public lands, may cancel such a certificate where he finds that the allottee has not complied with the requirements for issuance of a patent.

James Leland Wallace, 100 IBLA 70 (Nov. 30, 1987)

As a matter of general policy announced by the Secretary of the Interior, if a person seeking administrative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

The Board of Land Appeals must defer to policies announced by the Secretary of the Interior.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

The Secretary is not required, according to the 1956 Act, to affirmatively review and amend each existing contract, but at the same time not deny districts that contracted for water prior to 1956 a right to renewal of their contract, if they so request. Thus, the Secretary has no discretion as to whether to amend a contract to include a renewal clause if requested to do so. Furthermore, once a contract

SECRETARY OF THE INTERIOR--Continued

contains a renewal clause, the Secretary has no discretion to deny renewal of the contract.  
Renewal of Friant Unit Contracts, M-36961 (Nov. 10, 1988)  
96 I.D. 289

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988)  
95 I.D. 314

Where a decision of the Director, Minerals Management Service, is approved by an Assistant Secretary, the decision is final for the Department and the Board of Land Appeals lacks jurisdiction to review either the substance thereof or the procedures followed in issuing the decision.

Marathon Oil Co., 108 IBLA 177 (Apr. 12, 1989)

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director, Bureau of Indian Affairs, 17 IBIA 144 (June 21, 1989)



# SECRETARY OF THE INTERIOR--Continued

When it appears an applicant for a Native allotment may not have presented satisfactory proof of his substantially continuous use and occupancy of the land for a period of 5 years, the Board may, in the absence of legislative approval, review the record and act to prevent the mistaken issuance of a patent to the land to one not entitled to it, even if the Bureau of Land Management has already approved the application.

Ira Wassillie (On Reconsideration), 111 IBLA 53 (Sept. 20, 1989)

## SEGREGATION

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)

Where a lode mining claim is located partially on withdrawn or patented land, it is not null and void ab initio to the extent of its inclusion of such lands. A locator whose discovery is on lands open to location may extend the end lines and side lines of his claim across withdrawn or patented land to define the extralateral rights to lodes or veins which apex within the claim.

Timberline Mining Co., 87 IBLA 264 (June 24, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application is filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and

# SEGREGATION--Continued

noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E. Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

Although the Board has on one occasion undertaken an in pari materia consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an in pari materia consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985)

Where the exterior boundaries of a lode mining claim extend onto withdrawn land, that portion of the claim on withdrawn land is not null and void ab initio. A locator of a lode mining claim whose discovery is on land open to location may extend the end lines and side lines of his claim onto withdrawn land in order to

SEGREGATION--Continued

define the extralateral rights to lodes and veins which apex within the claim.

Donald R. Rowley, Mohawk Oil & Gas, Inc., 89 IBLA 248 (Oct. 29, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plat, regardless of what other records may have indicated regarding the validity of the applications. The ordinary citizen contemplating a proposed use or appropriation of the public lands would quite reasonably look to lands other than those within T. 10 N., R. 2 E., Seward Meridian, upon discerning from the master title plat for this township that it was included in State selection applications. Further, there is nothing on the face of the master title plat that would suggest the State selection entries were invalid.

Although the Board may undertake an *in pari materia* consideration of various land status records (e.g., the master title plat, historical index, and other use plats) as a further method of determining whether public lands were appropriated at a particular time, this is generally done only where a conflict appears between the master title plat and such other records. Here, an *in pari materia* consideration of other public land records in conjunction with the master title plat fails to establish that Chugach

SEGREGATION--Continued

National Forest lands (on which appellants' mining claims were located) were excluded from any of the three State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

The "notation" or "tract book" rule may not be invoked to attribute a segregative effect to a regional corporation selection filed under authority of sec. 12(a)(1) or 12(c)(3) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1611(a)(1), (c)(3) (1982), where the implementing regulations of the Department do not provide that the filing of such a selection application segregates the land from other appropriation.

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

Under the "notation" or "tract book" rule, when a state selection application is filed and noted on official land office records, the notation of the application has the effect of segregating the land from all subsequent appropriations, including locations



SEGREGATION--Continued

under the mining laws, regardless of whether the selection application was void or voidable.

David D. Beal, 90 IBLA 91 (Dec. 23, 1985)

Under the "notation" rule, BLM may properly declare an unpatented mining claim null and void ab initio where it is located at a time when the land is noted on the public land records as subject to a state selection, even though the notation is erroneous because the selection has already been invalidated by a BLM decision.

John J. Schnabel, Josephine Jurgeleit, 90 IBLA 147 (Dec. 30, 1985)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

Segregation of lands from appropriation under the Native Allotment Act by a proposed multiple-use management classification does not bar completion of the required 5-years' use and occupancy where such use and occupancy has commenced prior to the segregation.

United States v. Estate of George D. Estabrook, John J. Estabrook, Leland R. Estabrook, 94 IBLA 38 (Sept. 25, 1986)

SEGREGATION--Continued

Where a tract of land was segregated for township purposes but not entered or surveyed as a township as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Klawock, 94 IBLA 107 (Oct. 7, 1986)

Although regulation 43 CFR 2201.1(b) provides that publication of a notice of realty action on an exchange proposal may segregate the public lands covered by the notice to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, such segregation does not preclude BLM from considering during the pendency of the proposal a second exchange proposal, subsequently filed, that involves virtually the same selected public lands.

Havasu Heights Ranch & Development Corp., et al., 94 IBLA 243 (Nov. 13, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face, in that the land



SEGREGATION--Continued

selected is not legally subject to such selection under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

BLM properly rejects an application for an Indian allotment filed pursuant to sec. 4 of the Act of Feb. 8, 1887, as amended, 25 U.S.C. § 334 (1982), where, at the time the application was filed, the land was segregated, in accordance with 43 CFR 2711.1-2(d), from appropriation under the public land laws by publication in the Federal Register of notice of realty action offering the land for sale.

Frank F. Salsedo, 99 IBLA 170 (Oct. 2, 1987)

A mineral patent application does not segregate land from the acquisition of competing rights.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Mining claims located on land which was segregated in accordance with 43 CFR 2201.1(b) from appropriation under the mining laws by publication in the Federal Register of notice of realty action proposing the land for disposal by exchange are properly declared null and void ab initio.

Amelia Marglin Whitson, 101 IBLA 1 (Jan. 20, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that

SEGREGATION--Continued

injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(iii), (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

The mere filing of a notice of location for a trade and manufacturing site creates no rights in the land, and, without more, does not create in the one filing an interest in the land as against a subsequent applicant so as to subject the subsequent application to rejection.

Agnes Mayo Moore (On Judicial Remand), 102 IBLA 147 (Apr. 26, 1988)

The notation of an application on the proper BLM records has a segregative effect only when a statute or Departmental regulation provides that the filing of the application segregates the land.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

### SEGREGATION--Continued

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

Upon issuance of a final certificate of mineral entry for mining claims, the lands encompassed by the claims are closed to mineral entry by another person, and any claims located thereafter on the lands covered by the final certificate are null and void ab initio.

Melvin Helit, A-Able Plumbing, Inc., 110 IBLA 144 (Aug. 10, 1989)

### SETTLEMENTS ON PUBLIC LANDS

Under regulation 43 CFR 2091.5, authorized officers will determine by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by persons other than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

An Indian seeking an Indian allotment in Alaska under the Act of Feb. 8, 1887, has not established settlement under the Act or demonstrated sufficient use and possession to prevent the segregative effect of a grazing lease from attaching by settlement efforts consisting of brief visits to the vicinity of the allotment lands, one extended 30-day stay in the vicinity of the allotment lands, and insubstantial improvements on the land.

Henrietta Roberts Vaden v. Bureau of Land Management et al., 96 IBLA 198 (Mar. 19, 1987)

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

### SMALL TRACT ACT

#### APPRAISALS

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

SMALL TRACT ACT--ContinuedCLASSIFICATION

Lands classified as available for lease or sale under the Small Tract Act are segregated from all appropriation under the public land laws, including the mining laws, and mineral locations made on such lands are null and void ab initio.

Lands segregated from mineral location by classification under the Small Tract Act remain segregated until administrative action is taken to remove the classification.

Thom Seal et al., 92 IBLA 9 (Apr. 30, 1986)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

RENEWAL OF LEASE

A decision imposing fair market rental for a small tract lease will be affirmed where the appraisal determining the fair market rental value is conducted following established criteria, and the lessee fails to show error in the appraisal methods or present convincing evidence that the charges are excessive.

Lawrence Dupuis, 99 IBLA 174 (Oct. 2, 1987)

SODIUM LEASES AND PERMITS

(See also Mineral Leasing Act--if included in this Index.)

LEASES

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

Pursuant to 43 CFR 3504.1, BLM has authority to increase the bond for a sodium lease on Federal lands when a change in coverage is considered appropriate. Where BLM advises the lessee that the bonding requirements have been raised in light of recent production and sales data and in accordance with a bonding formula prescribed by Instruction Memorandum No. 86-145, lessee cannot be heard to complain that its bonding requirements were increased arbitrarily.

Texasgulf, Inc., 111 IBLA 267 (Oct. 26, 1989)



SODIUM LEASES AND PERMITS--ContinuedPERMITS

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge pursuant to the provisions of 43 CFR 3521.1-1(j)(2), before his lease application may be finally rejected.

Yankee Gulch Joint Venture et al., 84 IBLA 353 (Jan. 22, 1985)

A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date.

Steve Dwyer, 93 IBLA 283 (Aug. 29, 1986)

A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

John S. Wold, Eugene V. Simons, 95 IBLA 69 (Dec. 22, 1986)

RENTALS

A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date,

SODIUM LEASES AND PERMITS--ContinuedRENTALS--Continued

regardless of whether the permittee received a courtesy notice of rental due prior to that date.

Steve Dwyer, 93 IBLA 283 (Aug. 29, 1986)

SOLDIERS' ADDITIONAL HOMESTEADS

(See also Homesteads (Ordinary), Scrip--if included in this Index.)

The Act of Aug. 18, 1894, 43 U.S.C. § 276 (1982), validates certain categories of soldiers' additional homestead certificates issued prior to Aug. 18, 1894. It does not validate certificates issued after that date, nor does it validate uncertificated soldiers' additional homestead rights.

When an assignee of a soldiers' additional homestead right presents an application to enter land pursuant to such right, the identity of the original assignor with the soldier and original homestead entryman must be established by the affidavits of two witnesses having personal knowledge of the facts, or, if such witnesses cannot be procured, a satisfactory reason must be given and other facts presented tending to establish such identity.

Ben Cohen, Ray C. Nordstrom (On Judicial Remand), 103 IBLA 316 (Aug. 5, 1988)

SOLICITOR, DEPARTMENT OF THE INTERIOR

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of

SOLICITOR, DEPARTMENT OF THE INTERIOR--Continued

compelling equitable or legal reasons why the dismissal should be set aside.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

SPECIAL USE PERMITS

Where an application for a special use permit is filed after a deadline imposed by the Bureau of Land Management for compelling administrative reasons, the application is properly rejected.

Ken Warren Outdoors, Inc., 85 IBLA 354 (Mar. 25, 1985)

A BLM determination to issue special recreation use permits for two off-road vehicle events on Cow Mountain is discretionary, and BLM may properly approve permit applications for such organized events where the proposed use is consistent with the objectives, responsibilities, or programs for the management of the public lands involved.

Mendocino County Tax-Payers Land Use Committee, 86 IBLA 319 (May 16, 1985)

Any transfer of authorized use of a special recreation use permit in conjunction with the sale of the business by the permittee is subject to the approval of BLM. A decision denying reissuance of a commercial outfitter/guide permit and rescinding status as an authorized outfitter based on a sale of the permittee's business, and transfer of the permit without prior BLM approval will be affirmed where the record on appeal supports the BLM decision and is consistent with BLM's authority to impose sanctions for violations of the policy guidelines and permit conditions.

David Farley, Inc., 90 IBLA 112 (Dec. 23, 1985)

SPECIAL USE PERMITS--Continued

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Permit privileges may be canceled if a permittee has failed to satisfy minimum use requirements set forth in the provisions of the permit.

Don Hatch River Expeditions, 91 IBLA 291 (Apr. 15, 1986)

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

Hondoo River & Trails, 91 IBLA 296 (Apr. 15, 1986)

The issuance of a special recreation use permit for the 1984 version of the Barstow to Vegas motorcycle race, an annual event, will be affirmed where the environmental assessment (EA) upon which the decision is based is tiered to an environmental impact statement (EIS) to evaluate the impacts of the race and it is not shown that the EA fails to adequately consider the environmental impacts of those aspects of the race which differ from those considered in the EIS.

Yuma Audubon Society, Citizens for Mojave National Park, 91 IBLA 309 (Apr. 15, 1986)

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the

SPECIAL USE PERMITS--Continued

privilege to use and opportunity to make a profit on public lands and related waters.

Upper Rogue River Outfitters Ass'n, 93 IBLA 103 (July 23, 1986)

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled.

Peak River Expeditions, 94 IBLA 98 (Oct. 1, 1986)

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual-use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

Timber River Rafting, Inc., 95 IBLA 90 (Dec. 29, 1986)

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum-use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled. Allegations of discriminatory treatment which are not

SPECIAL USE PERMITS--Continued

supported by the case record will not serve as a basis to overturn BLM's action.

Peak River Expeditions (On Reconsideration), 98 IBLA 13 (May 29, 1987)

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

The issuance of a special recreation use permit is discretionary with the authorized officer, and where necessary, BLM may restrict use on the Dolores River during the 2-year period it is developing a management plan for the river, by issuing a limited number of special recreation permits. Where there is a reasonable basis for the selection process implementing its moratorium policy, the BLM decision will be affirmed.

Four Corners Expeditions et al., 104 IBLA 122 (Sept. 1, 1988)



SPECIAL USE PERMITS--Continued

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for, an organized off-road motorcycle observed trials event when there is evidence that the proposed use would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

Southern California Trials Ass'n, 104 IBLA 141 (Sept. 2, 1988)

It was proper for BLM to place the holder of a special recreation permit for commercial use of a wild and scenic river on probationary status. The evidence established that the permittee gave an authorized officer of BLM inaccurate information on a trip ticket. To do so was a specified violation of the permit stipulations, and the sanction imposed by BLM was called for in the permit stipulations.

Rogue Excursions Unlimited, Inc., 104 IBLA 322 (Sept. 20, 1988)

The issuance of a special recreation use permit is discretionary with the authorized officer, and where necessary, BLM may restrict use on the Dolores River during the 2-year period it is developing a management plan for the river by issuing a limited number of special recreation permits. Where there is a reasonable basis for the selection process implementing its moratorium policy, the BLM decision will be affirmed.

Duranglers, 105 IBLA 156 (Oct. 28, 1988)

In choosing between two qualified first-time applicants for a special recreation permit for walk-in fishing in the Gunnison Gorge, BLM's use of a coin toss to select the applicant was an equitable way to award the permit and will be affirmed.

The issuance of a special recreation permit is discretionary with the authorized officer, and where necessary, BLM may restrict use in the Gunnison Gorge by issuing a limited number of special recreation permits. Where there is a reasonable basis for the

SPECIAL USE PERMITS--Continued

selection process implementing its management policy, BLM's decision will be affirmed.

Gunnison River Expeditions, 108 IBLA 271 (Apr. 25, 1989)

STARE DECISIS

Under the principle of stare decisis, prior Departmental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an agency official may not be reconsidered after a party has been given an opportunity to obtain review within the Department and did not seek review, or appealed and the decision was affirmed. However, as a matter of administrative authority, so long as title to land affected by a decision remains within the Department, an erroneous decision may be corrected.

United States of America v. Vernard E. Jones, Cook Inlet Region, Inc., Nondalton Native Corp., Nondalton City Council, Nondalton Village Council (Intervenors), 106 IBLA 230 (Dec. 29, 1988) 95 I.D. 314

STATE COURTS

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a

STATE COURTS--Continued

settlement to which the United States is not a party cannot be binding upon the Department.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

STATE GRANTS

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

The Idaho Admission Act of July 3, 1890, granted the State secs. 16 and 36 in every township in Idaho for the support of the common schools. For sections already surveyed, this grant was immediately effective. For land surveyed after admission, title did not pass to the State until approval of the survey of the affected section. If land was mineral in character on the date of survey, title did not pass to the State until Jan. 25, 1927, when Congress extended school grants to lands that were mineral in character, excluding lands "subject to or included in any valued application, claim, or right \* \* \* unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled."

There is a presumption which exists, until the contrary is shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character is concerned.

Because an application for a mineral patent falls within the circumstances enumerated in the statute providing for the grant of mineral lands to states for school sections, 43 U.S.C. § 870 (1982), the filing of

STATE GRANTS--Continued

such an application provides the Secretary of the Interior jurisdiction to determine the mineral character of land subject to a state grant.

A mineral return upon the filing of the survey of a state school section does not have effect to establish the character of the lands as chiefly valuable for mineral, and cannot of itself operate to take school lands out of the grant to the state. A mining claimant, not the state, bears the ultimate burden of proving the land was mineral in character at the date of admission or the date of survey.

Before a mineral classification can become conclusive to a state's interest in a school section, notice and an opportunity for a hearing must be provided.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988) 95 I.D. 49

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

STATE LANDS

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law, 30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

STATE LANDS--Continued

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration),  
100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

STATE LAWS

A mining claim must be located in accordance with the applicable laws of the state in which the claim is located. A location which is not recorded in the time specified by state law is subject to intervening rights, and an unrecorded claim cannot be revived by an amendment recorded subsequent to withdrawal. An attempted amendment of a previously unrecorded claim

STATE LAWS--Continued

must be treated as a new location as to the rights of an intervenor.

Fletcher De Fisher, Fisher Internat'l, Inc., 93 IBLA 68 (July 15, 1986)

STATE SELECTIONS

(See also School Lands, Swamplands--if included in this Index.)

Where state selection applications were rejected by decisions approving conflicting Native allotment applications, the State of Alaska has standing to appeal those decisions to the Board of Land Appeals.

State of Alaska, 85 IBLA 196 (Feb. 27, 1985)

Where the public records indicate that land is segregated from appropriation by the filing of a state selection application, a mining claim located on such land is properly declared null and void ab initio.

William Mrak et al., 86 IBLA 16 (Mar. 29, 1985)

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless



# STATE SELECTIONS--Continued

of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

Although the Board has on one occasion undertaken an in pari materia consideration of various land status records (i.e., the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an in pari materia consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985) 92 I.D. 317

Lands conveyed to a state as a result of an in-lieu selection are not available for the location of mining claims under the Federal law. Mining claims located on such lands pursuant to the 1872 Mining Law, 30 U.S.C. §§ 21 through 54 (1982), are null and void ab initio.

Ralph C. Memmott, 88 IBLA 360 (Sept. 27, 1985)

# STATE SELECTIONS--Continued

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plat, regardless of what other records may have indicated regarding the validity of the applications. The ordinary citizen contemplating a proposed use or appropriation of the public lands would quite reasonably look to lands other than those within T. 10 N., R. 2 E., Seward Meridian, upon discerning from the master title plat for this township that it was included in State selection applications. Further, there is nothing on the face of the master title plat that would suggest the State selection entries were invalid.

Although the Board may undertake an in pari materia consideration of various land status records (e.g., the master title plat, historical index, and other use plats) as a further method of determining whether public lands were appropriated at a particular time, this is generally done only where a conflict appears between the master title plat and such other records. Here, an in pari materia consideration of other public land records in conjunction with the master title plat fails to establish that Chugach National Forest lands (on which appellants' mining claims were located) were excluded from any of the three State selection applications at issue or that such selection applications were rejected in part to

STATE SELECTIONS--Continued

the extent national forest lands were included in the applications.

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

Under the "notation" or "tract book" rule, when a state selection application is filed and noted on official land office records, the notation of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

David D. Beal, 90 IBLA 91 (Dec. 23, 1985)

Under the "notation" rule, BLM may properly declare an unpatented mining claim null and void ab initio where it is located at a time when the land is noted on the public land records as subject to a state selection, even though the notation is erroneous because the selection has already been invalidated by a BLM decision.

John J. Schnabel, Josephine Jurgeleit, 90 IBLA 147 (Dec. 30, 1985)

The subsistence protection provisions of the Alaska National Interest Lands Conservation Act may not prohibit or impair land selections made pursuant to the Alaska Statehood Act of July 7, 1958.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

Issuance of a patent to a state without mineral reservation removes the land from the jurisdiction of the Department, and the statutory requirement that a claimant file documents pursuant to 43 U.S.C. § 1744 (1982) is not applicable to claims located on such land. Therefore, documents filed pursuant to 43 U.S.C. § 1744 (1982) may properly be rejected.

Alamin Mining Corp., 90 IBLA 179 (Jan. 22, 1986)

STATE SELECTIONS--Continued

A selection application filed under the Alaska Statehood Act for land properly described in the appropriate Bureau of Land Management office segregates the land from all appropriation based upon subsequent application or settlement and location.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

Under sec. 6(g) of the Alaska Statehood Act, 72 Stat. 340, the Secretary of the Interior is required, when revoking an existing withdrawal of public land in Alaska, to provide a 90-day period during which time the State of Alaska is afforded a preference right to select the land. Where a public land order revokes a prior withdrawal so as to make the land available for selection by the State, the land may not be simultaneously opened for the location of mining claims for metalliferous minerals, and a public land order purportedly opening such land to mineral location is only effective after the passage of the 90-day period mandated by the Alaska Statehood Act.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

A mining claim located on land which had been subject to the final approval of a list of state-selected land is properly declared null and void ab initio.

Merrill G. Memmott, 100 IBLA 44 (Nov. 20, 1987)

Conveyance of lands to the State of Alaska pursuant to a State selection by tentative approval or patent subsequent to issuance of a right-of-way grant across lands selected is subject to the pre-existing right-of-way. A decision declaring the right-of-way null and void will be reversed notwithstanding the failure of the tentative approval or patent to refer to the right-of-way.

Golden Valley Electric Ass'n, 100 IBLA 318 (Dec. 31, 1987)

# STATE SELECTIONS--Continued

The filing of an amended state selection application after the conclusion of the 90-day withdrawal effected by 43 U.S.C. § 1616(d)(1) (1982), reasserts an earlier application filed during the withdrawal. Pursuant to 43 CFR 2627.4(b), a state selection, regular on its face, will segregate the land described therein from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in sec. 2627.3(c)(1)(iii) (iv), and (v). This segregation arises as a result of the filing of a state selection and operates independently of the notation rule.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

If a mineral patent application filed after Jan. 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

State of Idaho, 101 IBLA 340 (Mar. 23, 1988)<sup>95 I.D. 49</sup>

BLM properly approved for conveyance to the appropriate Native regional corporation the mineral estate reserved to the United States under a Native allotment approved within the 4-year period following Dec. 18, 1971, pursuant to sec. 14(h)(6) of the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1613(h)(6) (1982), and rejected a conflicting State selection.

State of Alaska, 105 IBLA 137 (Oct. 27, 1988)

# STATE SELECTIONS--Continued

The Board will affirm a BLM decision finding land proper for selection by the State of Alaska in the face of an appeal challenging that decision on the basis that the appellants have a superior interest in the land by virtue of a prior homestead entry where final proof submitted in support of that entry was rejected by BLM with administrative finality and appellants have not demonstrated that the rejection was erroneous.

Estate of Sam McGee & Alice Jo McGee-Ward-Pritchard, 108 IBLA 375 (May 19, 1989)

# STATUTE OF LIMITATIONS

The Indian Claims Commission was established by the Act of Aug. 13, 1946, 60 Stat. 1049, to compensate Indian tribes through the payment of money damages for past wrong doings by the United States. Until 1946 Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress. The Commission was authorized to hear all tribal claims against the United States that existed before Aug. 13, 1946. The Pueblo of Sandia did not participate in any proceedings before the Commission in reference to the lands involved here thus letting the statute of limitations run.

Pueblo of Sandia Boundary, M-36963 (Dec. 9, 1988)<sup>96 I.D. 331</sup>

# STATUTES

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, an individual may not premise a claim of estoppel on information or advice contrary to such a provision.

Marion E. Banks, Noble Craver, & August Carniglia, 88 IBLA 341 (Sept. 19, 1985)



STATUTES--Continued

The purposes of applying FLPMA's filing provisions to claims located before the Act was passed--to rid Federal lands of stale mining claims and to provide for centralized collection by Federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims--are clearly legitimate and, therefore, application of these provisions to claims located prior to FLPMA is permissible.

Thurman Oil & Mining Co., 90 IBLA 342 (Feb. 26, 1986)

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Ward Petroleum Corp., 93 IBLA 267 (Aug. 29, 1986)

Venlease I, 99 IBLA 387 (Nov. 10, 1987)

The Secretary is authorized to convey lands out of a wildlife refuge pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(h)(7) (1982). This authority has not been rescinded by amendments to the National Wildlife Refuge System Administration Act or by the Alaska National Interest Lands Conservation Act.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

STATUTES--Continued

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

Neither the assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" nor the prohibition that "thereafter no objection from third parties to the issuance of a patent shall be heard" applies to invalidate mining claims. The inability to initiate an adverse proceeding once the publication period has passed does not render mining claims invalid if they are otherwise valid under the law.

Scott Burnham (On Reconsideration), 102 IBLA 363 (June 10, 1988)

An essential element of a claim for estoppel is that the party asserting it must be ignorant of the true facts. Since, however, all persons are presumed to have knowledge of relevant statutory and regulatory provisions, estoppel will not lie when the legal consequences of an action are clearly set forth in statute and/or regulation.

Terra Resources, Inc., 107 IBLA 10 (Jan. 24, 1989)

## STATUTORY CONSTRUCTION

### GENERALLY

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

While sec. 206 of the Federal Land Policy and Management Act, 43 U.S.C. § 1716 (1982) is applicable to exchanges under 25 U.S.C. § 640d-10 (1982), the general prohibition of sec. 206 barring interstate exchanges is inapplicable. The specific language of 25 U.S.C. § 640d-10(b) (1982), providing that BLM lands anywhere within Arizona and New Mexico may be used for purposes of exchanging for lands within 18 miles of the boundary of the Navajo Reservation, is an exception to that general prohibition and is, thus, controlling.

Santa Fe Pacific Railroad Co., 90 IBLA 200 (Jan. 30, 1986)

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

Cook Inlet Region, Inc., et al. (On Reconsideration), 100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

## STATUTORY CONSTRUCTION--Continued

### GENERALLY--Continued

Provisions in an unamended section of a statute which were applicable to a second section of the statute prior to its amendment are applicable to the second section after its amendment in so far as they are consistent. If the consistency is not entirely clear from a plain reading of the amended statute, the legislative history of the amendment must be examined to determine if Congress intended to alter the applicability of the unamended section.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

Sec. 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1982), authorizes the collection of interest charges for late payment of oil and gas royalties. Sec. 305 of that Act, 30 U.S.C. § 1701 note (1982), provides that sec. 111 and regulations implemented pursuant thereto apply to oil and gas leases issued prior to the enactment of that Act, unless to do so would be contrary to express and specific provisions of those leases. Where no such provisions exist, the assessment of late payment charges is proper.

The procedural safeguards that apply when civil penalties are levied pursuant to 30 U.S.C. § 1719 (1982), are not applicable to late payment interest charges assessed pursuant to 30 U.S.C. § 1721(a) (1982). Coastal Oil and Gas Corp., et al., 108 IBLA 62 (Mar. 22, 1989)

### IMPLIED REPEALS

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)



STATUTORY CONSTRUCTION--ContinuedINDIANS

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

Star Lake Railroad Co. v. Area Director, Navajo Area Office, Bureau of Indian Affairs & Navajo Tribe of Indians, 15 IBIA 220 (July 10, 1987) 94 I.D. 353

LEGISLATIVE HISTORY

The legislative history of the Act of July 6, 1960, clearly shows that Congress concluded that the Federal Government holds title to land relinquished to the Federal Government in anticipation of a forest lieu exchange, notwithstanding the failure to consummate the exchange.

Frederick Siemon, 86 IBLA 149 (Apr. 25, 1985)

The language of sec. 601(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1781(f) (1982), was intended by Congress to have application to patents issued to mining claims which had been perfected after passage of the Act. A patent to a mining claim which had been perfected prior to passage of the Act should, therefore, not contain the restrictive language contemplated by sec. 601(f).

Lee Chemicals, 86 IBLA 164 (Apr. 25, 1985)

STOCK-RAISING HOMESTEADS

(See also Homesteads (Ordinary)--if included in this Index.)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

A decision approving a bond filed by a mineral claimant of reserved minerals on land patented under the Stock-Raising Homestead Act will be affirmed when the owner of the surface estate failed to file objections to issuance of the bond pursuant to 43 CFR 3814.1(d), notwithstanding the fact that the surface owner has filed a civil complaint against the mineral claimant and intends to initiate a private contest against the mineral claimant.

Visintainer Sheep Co., 97 IBLA 63 (Apr. 27, 1987)

The unauthorized removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass against the United States. The fact that the United States could not presently dispose of the deposit does not affect either the right of the United States to recover damages for the trespass nor the valuation of the deposit so removed.

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under



STOCK-RAISING HOMESTEADS--Continued

that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

Adjudication of a mineral claimant's bond pursuant to 43 U.S.C. § 299 (1982), does not require a formal hearing on the record in conformity to provisions of the Administrative Procedure Act, 5 U.S.C. § 557 (1982). The landowner's rights to notice and an opportunity to be heard concerning the adequacy of the bond furnished to protect his rights as a property owner are safeguarded by the right of appeal to this Board.

A mineral claimant's bond given to enable mining on land patented under the Stock-Raising Homestead Act must be executed by all mineral claimants seeking to re-enter the patented lands.

A mineral claimant's bond must identify the claims sought to be entered by a mineral claimant seeking to re-enter SHRA lands, so as to permit BLM to determine possible damages to crops, surface improvements, and the grazing value of the land within those claims.

Brock Livestock Co., Inc., 101 IBLA 91 (Feb. 2, 1988)

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the

STOCK-RAISING HOMESTEADS--Continued

mineral claimant's proposed activities on the patented lands.

William & Pearl Hayes, 101 IBLA 110 (Feb. 2, 1988)

An Indian who has received an allotment of 160 acres of public domain land pursuant to sec. 4 of the Act of Feb. 8, 1887, 25 U.S.C. § 334 (1982), is deemed to have exhausted his rights under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), only to that extent and may be entitled to apply for a stock-raising homestead entry of 480 acres of public domain land, and, upon relinquishment of that application, pursuant to sec. 13 of the Act of Mar. 3, 1921, 41 Stat. 1239, to apply for 480 acres of lieu lands, if there has been compliance with all applicable laws.

Heirs of George Martinez, Heirs of Arthur Chavez, 103 IBLA 375 (Aug. 15, 1988)

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

SUBMERGED LANDS

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, including lands beneath the Susitna River.

Cook Inlet Region, Inc., et al., 90 IBLA 135 (Dec. 24, 1985)  
92 I.D. 620

SUBMERGED LANDS--Continued

Lands under navigable waters were held for the benefit of future states, and a State's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the State.

Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

Cook Inlet Region, Inc., et al. (On Reconsideration),  
100 IBLA 50 (Nov. 24, 1987) 94 I.D. 422

The number of acres of submerged land chargeable against the entitlement of Chugach Alaska Corporation under secs. 12(c) and 14(h)(8) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1611(c) and 1613(h)(8) (1982), for interim conveyances made prior to Dec. 5, 1983, and resulting from a settlement agreement signed by the Secretary of the Interior, is properly calculated in accordance with 43 CFR 2650.5-1(b) (1982), as required by that agreement, regardless of a subsequent change in Secretarial policy and amendment of that regulation.

Chugach Alaska Corp., 101 IBLA 375 (Mar. 30, 1988)

Lands under navigable waters were held for the benefit of future states, and a state's title to such lands cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

State of Alaska, 102 IBLA 357 (June 10, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

## GENERALLY

Sec. 528(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply to mining operations which affect 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." Where 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above ground disturbance, the total affected area is 2.17 acres and appellant's mining operation is within the jurisdiction of the Act.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

In order to qualify for an exemption under the terms of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A), the extraction of coal must be both incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale.

"Incidental." The extraction of coal is not incidental to the extraction of other minerals where the mining of coal is essential to the economic viability of the mine; the coal is the deepest strata mined for commercial use or sale; the acreage of the shallower deposits extracted for commercial use or sale is less than 50 percent of the acreage of the coal deposit extracted; the acreage of the mineral deposit immediately above the coal seam extracted is less than 5 percent of the acreage of coal extracted; and the decision to mine the deposit immediately above the coal is based on the decision to mine the coal.

McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 282 (Mar. 15, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

GENERALLY--Continued

To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982), extraction of coal must be incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it.

JDG, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 210 (Feb. 16, 1989)

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

"Supervised by an Indian tribe." As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian owns either the mineral estate, the surface estate in fee, or both.

Valencia Energy Co., et al., 109 IBLA 40 (May 26, 1989) 96 I.D. 239

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, the prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987) 94 I.D. 12

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer, that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Generally--Continued

The Board of Land Appeals need not decide whether a permittee could retroactively take advantage of an amended regulation allowing for extensions of the abatement period where there is no evidence in the record which would show affirmatively the permittee's entitlement to such an extension, even if it were available.

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Generally--Continued

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

L.W. Overly Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 356 (Aug. 11, 1988)

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Generally--Continued

period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

Timely performance of abatement activities required by a notice of violation cannot be considered as a stipulation by the permittee that the notice was validly issued.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Where a notice of violation has properly been issued citing an operator for failure to post an acceptable performance bond, and no acceptable bond is tendered within the maximum 90-day abatement period allowed to be afforded to the permittee to abate the violation pursuant to 30 CFR 843.12(c), OSMRE properly

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Generally--Continued

issues a cessation order for failure to abate a violation.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 153 (Dec. 7, 1989)

Remedial Actions

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Remedial\_Actions--Continued

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ABATEMENT--Continued

Remedial\_Actions--Continued

required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

ADMINISTRATIVE PROCEDURE

Generally

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

A document styled as an "application for review" filed within 30 days of receipt of a proposed assessment of a civil penalty will not be considered an application for review of a notice of violation or cessation order where the record shows the person filing the document was served with the notice of violation or cessation order more than 30 days prior to the filing; however, the document may be considered

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

to be a petition for review of a proposed civil penalty.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement, Daryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 371 (July 1, 1986)

When an operator has made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and when that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which conforms with the requirements of 31 U.S.C. § 3716 (1982).

McWane Coal Co., Inc., 95 IBLA 1 (Dec. 11, 1986)  
93 I.D. 460

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the applicant had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

Where the pleadings reveal that no material issue of fact is in dispute, no hearing is required to be held by the Administrative Law Judge, notwithstanding the terms of 30 U.S.C. § 1275 (1982), providing an opportunity for a public hearing to a permittee seeking review of a cessation order or notice of violation.

A person filing an application for review of a cessation order under 43 CFR 4.1160, shall file such application within 30 days of receipt of the order. A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

Where an Administrative Law Judge has made an interlocutory ruling that an applicant's failure to file its application for review timely did not deprive him of jurisdiction over the matter, and where the judge has considered and denied OSMRE's request that this question be certified to the Board of Land Appeals under 43 CFR 4.1124, OSMRE's petition for permission to appeal the interlocutory ruling to the Board under 43 CFR 4.1272(a) is properly granted, because resolution of this question will materially advance disposition of the case.

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR 4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of compelling equitable or legal reasons why the dismissal should be set aside.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Where OSMRE issues a notice of violation and more than 5 years later during a hearing held pursuant to the filing of a petition for review of a civil penalty based on that notice and a subsequent cessation order, the permittee raises for the first time lack of service of the notice of violation, that issue will be considered not timely raised. By failing to raise the issue in its petition or an amendment thereto, the permittee



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

waived its opportunity subsequently to challenge service.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

When OSMRE issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSMRE's decision affirming the finding of the state regulatory authority that blasting operations did not cause the property damage and refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286 where there are material issues of fact as to whether the blasting operations were a causative factor in the damage.

Mr. & Mrs. William J. Hamilton, 105 IBLA 160 (Oct. 28, 1988)

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989)  
 96 I.D. 139

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

43 CFR 4.1273(c) requires that an appellant's brief to the Board shall state specifically the rulings of an Administrative Law Judge to which there is an objection, the reasons for such objections, and the relief requested. A brief that repeats verbatim the arguments made to the Administrative Law Judge after the hearing does not comply with this regulation because it does not state the reasons for the objections.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

In order to dismiss a proceeding on the basis of undue delay, the moving party must show that the delay directly and adversely affected its ability to present its evidence on a controlling factual or legal issue.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

In accordance with 43 CFR 4.1273(a), an appellant's brief is due within 30 days of the filing of the notice of appeal. The regulations provide that if an appellant fails to file a timely brief, the appeal may be subject to summary dismissal. 43 CFR 4.1273(b). However, the failure to file a brief is not fatal where the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant in an appeal of a decision of an Administrative Law Judge, filed pursuant to 43 CFR 4.1271(a), provides mere conclusory allegations in its notice of appeal, without supporting reasons, and does not file a brief, the appeal may be dismissed.

Lloyd D. Livesay, dba Nu Way Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 137 (Dec. 4, 1989)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Generally--Continued

Under the enforcement scheme of the Act and regulations, a variety of procedures is available to OSMRE to collect delinquent reclamation fees from coal operators. These procedures include, among others, the institution of an action at law in a court of competent jurisdiction and, where appropriate, the issuance of notices of violation and cessation orders to compel payment of the debt.

Black Hawk Coal Co. & Gary Yeanev v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 248 (Dec. 28, 1989)

Burden of Proof

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)  
92 I.D. 68

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)  
93 I.D. 199

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 194 (Aug. 15, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 365 (Jan. 12, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 10 (June 22, 1988)

In a hearing on an application for review of a notice of violation or cessation order, OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

In a civil penalty proceeding OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. If

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

that showing goes un rebutted, it will sustain the violation.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When OSMRE's prima facie case that the operator failed to return all disturbed areas to their approximate original contour is un rebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 323 (June 3, 1988)

At a hearing, OSMRE has the burden of going forward to establish a prima facie case as to the validity of the notice of violation by the submission of sufficient evidence to establish the essential facts of the violation. However, the ultimate burden of persuasion rests with the applicant for review. If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 166 (Dec. 11, 1989)

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden of Proof--Continued

evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988)  
 95 I.D. 293

In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. If OSMRE meets its burden, the ultimate burden of persuasion rests with the applicant for review.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

Scope of Review

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ADMINISTRATIVE PROCEDURE--Continued

Scope of Review--Continued

the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

APPEALS

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the applicant had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 274 (Oct. 20, 1987)

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

Where an Administrative Law Judge has made an interlocutory ruling that an applicant's failure to file its application for review timely did not deprive him of jurisdiction over the matter, and where the judge has considered and denied OSMRE's request that this question be certified to the Board of Land Appeals under 43 CFR 4.1124, OSMRE's petition for permission to appeal the interlocutory ruling to the Board under 43 CFR 4.1272(a) is properly granted, because resolution of this question will materially advance disposition of the case.

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

Under 43 U.S.C. § 1276(a)(1) (1982), judicial review of the validity of regulations promulgated under the Surface Mining Control and Reclamation Act of 1977 is available only in the United States District Court for the District of Columbia, and the Interior Board of Land Appeals will not entertain arguments based on claims as to the invalidity of regulations promulgated under that Act.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

Under 30 CFR 775.11(a), a request for a hearing must be filed within 30 days after an applicant or permittee is notified of OSMRE's final decision on an application for a permit revision. The timely filing of a request for a hearing is jurisdictional and failure to file the request within the time allowed requires dismissal of the proceedings.

Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement & Peabody Coal Co., 103 IBLA 44 (June 27, 1988)

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989)  
 96 I.D. 139

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

Pursuant to 43 CFR 4.1270(b), a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding which is not timely filed must be denied.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 374 (June 23, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Generally--Continued

43 CFR 4.1273(c) requires that an appellant's brief to the Board shall state specifically the rulings of an Administrative Law Judge to which there is an objection, the reasons for such objections, and the relief requested. A brief that repeats verbatim the arguments made to the Administrative Law Judge after the hearing does not comply with this regulation because it does not state the reasons for the objections.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

In accordance with 43 CFR 4.1273(a), an appellant's brief is due within 30 days of the filing of the notice of appeal. The regulations provide that if an appellant fails to file a timely brief, the appeal may be subject to summary dismissal. 43 CFR 4.1273(b). However, the failure to file a brief is not fatal where the notice of appeal contains sufficient grounds to support an appeal.

Where an appellant in an appeal of a decision of an Administrative Law Judge, filed pursuant to 43 CFR 4.1271(a), provides mere conclusory allegations in its notice of appeal, without supporting reasons, and does not file a brief, the appeal may be dismissed.

Lloyd D. Livesay, dba Nu Way Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 137 (Dec. 4, 1989)

Effect\_of

OSMRE has jurisdiction to issue a cessation order for failure to abate a violation contained in a notice of violation that is the subject of administrative review before the Office of Hearings and Appeals.

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPEALS--Continued

Effect\_of--Continued

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 92 (Mar. 28, 1989)

APPLICABILITY

Generally

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)  
92 I.D. 68

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

"Dredging." Dredging to recover coal from a lake or river is a surface coal mining operation as defined in the Surface Mining Control and Reclamation Act of 1977. A company in the business of dredging sand, gravel, and coal from a river is required to pay reclamation fees pursuant to the Surface Mining Control and Reclamation Act of 1977 unless otherwise exempted by the Act.

Cumberland Reclamation Co., 102 IBLA 100 (Apr. 18, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPLICABILITY--Continued

Generally--Continued

The Office of Surface Mining Reclamation and Enforcement has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in 30 U.S.C. § 1267(a) (1982). In regard to inspections, the only issue as to "subject matter jurisdiction" would be a claim that the site inspected is outside the scope of the Surface Mining Control and Reclamation Act of 1977 because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

A permittee must comply with the surface and ground water monitoring requirements of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations until the successful completion of all reclamation necessary and incident to its past surface coal mining operations and appropriate release of its performance bond, even where current mining operations might be considered exempt from regulation under that Act.

McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 29 (Oct. 14, 1988)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPLICABILITY--Continued

Generally--Continued

area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits, is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

"Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (1982), and 30 CFR 700.11(a)(3), which exclude the "extraction of coal as an incidental part of Federal, State, or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction.

Wilder Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 107 (Nov. 30, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPLICABILITY--Continued

Enforcement Provisions

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Initial Regulatory Program

30 CFR 715.14(e) is an initial program regulation that requires that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour. Compliance with a state permit allowing an underwater highwall does not excuse failure to comply with this regulation.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

APPROXIMATE ORIGINAL CONTOUR

Generally

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, and neither that Act nor those regulations provide authority for an evaluation of comparative

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPROXIMATE ORIGINAL CONTOUR--Continued

Generally--Continued

environmental harm from eliminating highwall exposures or allowing such exposures to remain.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

Access roads or terraces created during mining operations must be backfilled and graded so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated. Where an access road or terrace not described in a mining plan is constructed, and a NOV is issued as a result thereof calling for backfilling and regrading as the means for abatement, OSM may properly refuse acceptance of a subsequently submitted mining plan designating the disturbed area as a road necessary for postmining land use.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When OSMRE's prima facie case that the operator failed to return all disturbed areas to their approximate original contour is un rebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 323 (June 3, 1988)

"Appropriate contour." "Appropriate contour" in 30 CFR 715.14(e) is not synonymous with "approximate original contour," but the regulation requires that all highwalls be eliminated by grading.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

APPROXIMATE ORIGINAL CONTOUR--Continued

Generally--Continued

Where the evidence establishes that operations under the initial regulatory program adversely affected a pre-existing highwall by cutting into the highwall, appellant has "used or disturbed" the highwall and was required, under the interim regulations, to eliminate the orphan highwall.

Under the applicable permanent program regulation, 30 CFR 816.106(b), a pre-existing highwall must be completely eliminated unless there is insufficient reasonably available spoil to completely backfill the area. All spoil within the permit which is accessible and available for use is, by definition, reasonably available spoil.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

AREAS UNSUITABLE FOR SURFACE COAL MINING

Generally

Where OSM has not acted in an arbitrary and capricious fashion, a decision under 30 CFR 764.15(a)(7) not to consider an unsuitability petition filed pursuant to sec. 522(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(c) (1982), to the extent it involves land which is subject to a Federal Coal Mining and Reclamation permit application which was filed, and the first newspaper notice thereof published, prior to the filing of the petition, will be affirmed.

Donald B. Peterson, 97 IBLA 314 (May 19, 1987)

Under sec. 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 43 U.S.C. § 1272(e)(1) (1982), after Aug. 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on Aug. 3, 1977, shall be permitted on any lands within the boundaries of units of the National Park System. If the owner of coal underlying National Park System lands admits that there was no surface coal mining operations prior to Aug. 3,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

AREAS UNSUITABLE FOR SURFACE COAL MINING--Continued

Generally--Continued

1977, on the tract in question, and that an application for a permit to conduct such operations had not been filed prior to that date, the coal owner is prohibited from conducting surface coal mining operations within the boundaries of a unit of the National Park System.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Areas Designated by Congress

Under sec. 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 43 U.S.C. § 1272(e)(1) (1982), after Aug. 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on Aug. 3, 1977, shall be permitted on any lands within the boundaries of units of the National Park System. If the owner of coal underlying National Park System lands admits that there was no surface coal mining operations prior to Aug. 3, 1977, on the tract in question, and that an application for a permit to conduct such operations had not been filed prior to that date, the coal owner is prohibited from conducting surface coal mining operations within the boundaries of a unit of the National Park System.

Ruth Z. Ainsley, 98 IBLA 306 (July 30, 1987)

Areas Designated Pursuant to Petition

Regulation 30 CFR 942.764(c) is properly construed to mean that final unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated.

Frozen Head State Park Ass'n, et al., 102 IBLA 32 (Apr. 7, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES

Generally

The provision for the awarding of costs and expenses, including attorneys' fees, in sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), is applicable to permit review proceedings initiated and prosecuted pursuant to sec. 514 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264 (1982).

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989) 96 I.D. 83

The forum in which a petition for an award of costs and expenses, including attorneys' fees, is properly filed as dictated in accordance with 43 CFR 4.1291, by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board.

A petition for an award of costs and expenses, including attorneys' fees, must be filed within 45 days of receipt of the decision, or order of the Board that disposes of the case, even if a petition for reconsideration or other motion is filed concerning that decision or order.

When good cause exists for the failure to file a petition for an award for costs and expenses within 45 days of receipt of a final order, there is no waiver of the right to such an award.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, Save Our Cumberland Mountains, Bledsoe County Chapter (Intervenor), 108 IBLA 114 (Mar. 30, 1989)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Bad Faith/Harassment

A permittee must show that OSMRE initiated an enforcement action against it in bad faith and for the purpose of harassing or embarrassing it in order to be awarded costs and expenses from OSMRE for participation in an administrative proceeding in accordance with sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 1294(c). Prevailing over OSMRE before the Hearings Division does not demonstrate the bad faith or improper purpose that are necessary for such award.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

Final Order

A request for award of costs and expenses under sec. 525(e) of SMCRA is properly filed only following issuance of a final order in the proceeding. 43 CFR 4.1291. A request filed during the pendency of a proceeding is properly dismissed as untimely.

Fresa Construction Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229 (Feb. 26, 1988)

The forum in which a petition for an award of costs and expenses, including attorneys' fees, is properly filed as dictated, in accordance with 43 CFR 4.1291, by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board.

A petition for an award of costs and expenses, including attorneys' fees, must be filed within 45 days of receipt of the decision or order of the Board that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Final Order--Continued

disposes of the case, even if a petition for reconsideration or other motion is filed concerning that decision or order.

When good cause exists for the failure to file a petition for an award for costs and expenses within 45 days of receipt of a final order, there is no waiver of the right to such an award.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, Save Our Cumberland Mountains, Bledsoe County Chapter (Intervenor), 108 IBLA 114 (Mar. 30, 1989)

Standards for Award

Appellants' failure to obtain any part of the benefit sought by their claims for relief prevents payment of their claim for reimbursement of costs, expenses, and attorney's fees pursuant to provision of 43 CFR 4.1290 and 4.1294.

Appellants' failure to make a substantial contribution to the resolution of pending claims for relief and to achieve some degree of success in prosecuting their claims before the Department bars award of attorney's fees under Departmental regulations and applicable law.

Donald St. Clair et al., 84 IBLA 236 (Jan. 2, 1985)  
92 I.D. 1

In computing an award for attorney's fees under the Surface Mining Control and Reclamation Act of 1977 and Departmental regulations, the Board is guided by the standards set forth by the United States Court of Appeals for the District of Columbia Circuit in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Under Copeland, the Board must first establish the "lodestar," i.e., the number of hours expended times a reasonable hourly rate. In order to establish market value for services of attorneys who do not have hourly rates set by the marketplace, it is necessary to look

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

to rates charged by comparable attorneys litigating similar matters who have such rates.

The burden of proving that upward adjustment of an award for attorneys' fees is appropriate is on the applicant for the award. No upward adjustments are warranted for factors such as risk of success where the case is not exceptional, and delay in payment where delay is not inordinate.

Virginia Citizens for Better Reclamation, Virginia D. Hill, 88 IBLA 126 (Aug. 2, 1985)

A determination that the amount petitioned for as an award of costs of expenses is reasonable will be set aside where it was not arrived at in accordance with the proper fee computation standards.

Alternate Fuels, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 187 (July 21, 1988)

Regulation 43 CFR 4.1294 provides that in order to recover an award of costs and expenses, including attorneys' fees, from a permittee, there must, inter alia, be a finding that the permittee violated the Surface Mining Control and Reclamation Act of 1977, the regulations promulgated pursuant to that Act, or a permit condition. Where in a proceeding to review the issuance of a permit to mine there is no such finding, a petitioner may not recover an award from the permittee.

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

award the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.

A person challenging issuance of a permit to mine will be deemed eligible for an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1294(b), where the person achieved at least some degree of success on the merits. A finding by the Board of Land Appeals that, in part, vindicated the person's position that the permit was improperly issued, constitutes some degree of success on the merits even though the Board did not grant the ultimate relief requested by the person.

Where one is determined, pursuant to 43 CFR 4.1294(b), to be eligible for and entitled to an appropriate award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), a further determination must be made of what issues are compensable. This inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. Unsuccessful claims unrelated to successful ones will not be compensated.

In determining the amount of an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board of Land Appeals will use the "lodestar" formula, i.e., the number of hours reasonably expended on qualifying work multiplied by the reasonable hourly rate. There is a strong presumption that the lodestar represents the reasonable fee to which counsel is entitled.

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed in preparing and filing the petition for review of the permit. However, such an award will not include compensation for work



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

performed in state proceedings involving the same mine-site and a related state permitting process.

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed with respect to procedural victories which contributed to the person achieving some degree of success on the merits. However, OSMRE is not liable for attorneys' fees for procedural victories against parties other than OSMRE.

In determining the number of hours reasonably expended on qualifying work with respect to an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), where the petitioner had achieved at least some degree of success on the merits, the Board may utilize, in the absence of an alternative approach, a page-counting method whereby the petitioner's major pleadings at various stages of the proceeding are examined to determine the number of pages devoted to a particular issue out of the total pages in the document. That percentage is then applied to the total number of hours sought to arrive at the number of hours reasonably expended.

A person challenging issuance of a permit to mine is not entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed on unsuccessful settlement negotiations where the petitioner makes no attempt to relate the hours claimed to any particular entry on the attorneys' time records or to limit the hours claimed to only those issues upon which petitioner was ultimately successful.

A person who is eligible and entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), may also receive compensation for work performed in prosecuting

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

the petition for an award, commensurate with the degree of success achieved in the underlying proceedings.

In determining the reasonable hourly rate for purposes of calculation of the "lodestar" amount in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board will use that market rate prevailing at the time of the relevant administrative proceedings in the community where the proceedings took place. However, where the petitioner for an award can show that counsel with specialized expertise was essential to prosecution of the case, the Board may approve an hourly rate from the area where such counsel customarily practices.

No enhancement of a "lodestar" amount will be granted in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), based on the contingency of the award, where the success and impact of the case were not exceptional.

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for the expenses of an expert witness who assisted the person in preparing and presenting its case, commensurate with the degree of success achieved by the person on those issues addressed by the expert.

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for those expenses which are normally passed along to clients of the attorney representing that person, commensurate with the degree of success achieved by the person in the proceedings in question.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989) 96 I.D. 83



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
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ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Standards for Award--Continued

Where an organization timely petitions for an award of costs and expenses including attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1290-4.1296, and the Office of Surface Mining Reclamation and Enforcement files a response stating that it has no objection to the petition, the Board will approve the petition if it meets the requirements set forth in the regulations. Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act may be eligible for an award of attorneys' fees from the Office of Surface Mining Reclamation and Enforcement if he prevails in whole or in part, achieving at least some degree of success on the merits. To be entitled to an award, the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues. Where the person has prevailed on all issues decided in the appeal and the Board has granted his request for specific relief, he has made such a contribution and is entitled to costs and expenses, including attorneys' fees.

Save Our Cumberland Mountains, Inc., 111 IBLA 197  
(Oct. 11, 1989)

Substantial Contribution

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation requires that the record show that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ATTORNEYS' FEES/COSTS AND EXPENSES--Continued

Substantial Contribution--Continued

the person made a substantial contribution to a full and fair determination of the issues.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation and Enforcement (Respondent), West Elk Coal Co., State of Colorado (Intervenors), 107 IBLA 339 (Mar. 20, 1989)  
96 I.D. 83

Where an organization timely petitions for an award of costs and expenses including attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1290-4.1296, and the Office of Surface Mining Reclamation and Enforcement files a response stating that it has no objection to the petition, the Board will approve the petition if it meets the requirements set forth in the regulations. Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act may be eligible for an award of attorneys' fees from the Office of Surface Mining Reclamation and Enforcement if he prevails in whole or in part, achieving at least some degree of success on the merits. To be entitled to an award, the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues. Where the person has prevailed on all issues decided in the appeal and the Board has granted his request for specific relief, he has made such a contribution and is entitled to costs and expenses, including attorneys' fees.

Save Our Cumberland Mountains, Inc., 111 IBLA 197  
(Oct. 11, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS

Generally

Access roads or terraces created during mining operations must be backfilled and graded so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with all highwalls and spoil piles eliminated. Where an access road or terrace not described in a mining plan is constructed, and a NOV is issued as a result thereof calling for backfilling and regrading as the means for abatement, OSM may properly refuse acceptance of a subsequently submitted mining plan designating the disturbed area as a road necessary for postmining land use.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilization by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Generally--Continued

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When OSMRE's prima facie case that the operator failed to return all disturbed areas to their approximate original contour is un rebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 323 (June 3, 1988)

Where OSMRE fails to present evidence showing that rills and gullies found at a minesite are greater than 9 inches deep, it has not met its burden of establishing a prima facie case that the terms of 30 CFR 715.14(i) have been violated.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110. In the absence of any applicable regulation, or other



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Generally--Continued

agency guidance, providing a definition for "established," a dictionary definition of "established" may be applied.

The Pittsburgh & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 246 (Feb. 22, 1989)

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

Highwall\_Elimination

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, and neither that Act nor those regulations provide authority for an evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Highwall\_Elimination--Continued

OSMRE is not estopped to require elimination of highwalls by the fact that its inspectors failed to inform the permittee of this obligation during the course of mining.

No authority exists in the Act or regulations to excuse highwall elimination by comparing the costs and benefits of reclamation, or weighing such costs against the degree and kind of wrong involved.

Where the evidence in a case shows the complete merger of the ownership and control of a corporation, such that the corporation is merely acting as the individual's alter ego, the individual cannot be allowed to escape responsibility for the statutory requirement to eliminate highwalls by hiding behind the corporate entity.

Shelbiana Construction Co. v. Office of Surface Mining Reclamation & Enforcement, Sammy Goff v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 19 (Apr. 6, 1988)

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982); where the State and Federal enforcement actions did not arise from the same operative facts.

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Where, in accordance with 30 CFR 700.11(c), a state regulatory authority has, by virtue of issuing a 2-acre permit, made a determination that a surface coal mining operation is exempt from compliance with



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Highwall\_Elimination--Continued

the requirement to eliminate all highwalls set forth in sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), and subsequently reverses that determination by taking other enforcement action inconsistent with that exemption, OSMRE will not be considered barred from taking action to require elimination of all highwalls where the offending highwall created by such operations constituted an existing violation at the time of reversal.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Estoppel will not lie when the party asserting it is charged with knowledge of the requirements of a regulation, because the person is not ignorant of the true facts. OSMRE's failure to inform a permittee of a requirement to eliminate an underwater highwall by grading it to an appropriate contour does not constitute affirmative misconduct for purposes of estoppel.

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

30 CFR 715.14(e) is an initial program regulation that requires that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour. Compliance with a state permit allowing an underwater highwall does not excuse failure to comply with this regulation.

"Appropriate contour." "Appropriate contour" in 30 CFR 715.14(e) is not synonymous with "approximate original contour," but the regulation requires that all highwalls be eliminated by grading.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BACKFILLING AND GRADING REQUIREMENTS--Continued

Highwall\_Elimination--Continued

Where the evidence establishes that operations under the initial regulatory program adversely affected a pre-existing highwall by cutting into the highwall, appellant has "used or disturbed" the highwall and was required, under the interim regulations, to eliminate the orphan highwall.

Under the applicable permanent program regulation, 30 CFR 816.106(b), a pre-existing highwall must be completely eliminated unless there is insufficient reasonably available spoil to completely backfill the area. All spoil within the permit which is accessible and available for use is, by definition, reasonably available spoil.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

BLASTING AND USE OF EXPLOSIVES

Generally

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986) 93 I.D. 199

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BLASTING AND USE OF EXPLOSIVES--Continued

Generally--Continued

A decision by the Director, Office of Surface Mining Reclamation and Enforcement, or his delegate, in response to a citizen's complaint alleging that damage to a dwelling has been caused by blasting operations conducted by a surface coal mining operation, declining to take enforcement action pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (1982), is subject to appeal to the Board of Land Appeals. Where such a decision is based on a finding after inspection that the damage was not caused by blasting operations, the decision may be set aside and the case referred to an evidentiary hearing before an administrative law judge pursuant to 43 CFR 4.1286 where the issue of whether the blasting is a causative factor in the damage is a material issue of fact dispositive of the appeal.

Clifford Mackey et al., 99 IBLA 285 (Oct. 23, 1987)

When OSMRE issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSMRE's decision affirming the finding of the state regulatory authority that blasting operations did not cause the property damage and refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286 where there are material issues of fact as to whether the blasting operations were a causative factor in the damage.

Mr. & Mrs. William J. Hamilton, 105 IBLA 160 (Oct. 28, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BONDS

Generally

Where the record is unclear whether the surety of a performance bond was served by certified mail with OSMRE's notice of determination to forfeit the bond and the surety on appeal expresses its intention to reclaim the permit area, OSMRE should properly re-serve its notice of determination in accordance with 30 CFR 800.50.

American Resources Insurance Co., Inc., 99 IBLA 242 (Oct. 20, 1987)

The Office of Surface Mining Reclamation and Enforcement properly issued a Notice of Violation for failure to comply with 30 CFR 942.800(b)(3) where an operator did not post an acceptable new bond within 30 days of the effective date of the Federal program in Tennessee.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 24 (Aug. 19, 1988)

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SM CRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

Where a notice of violation has properly been issued citing an operator for failure to post an acceptable performance bond, and no acceptable bond is tendered within the maximum 90-day abatement period allowed to be afforded to the permittee to abate the violation pursuant to 30 CFR 843.12(c), OSMRE properly

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BONDS--Continued

Generally--Continued

issues a cessation order for failure to abate a violation.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 153 (Dec. 7, 1989)

Forfeiture\_of

Neither SMCRRA nor Departmental regulations implementing SMCRRA contain provisions which operate to release a minesite from regulatory enforcement when a reclamation bond is forfeited. Under the provisions of 30 U.S.C. § 1259(b) (1982), an operator is liable for the duration of the surface coal mining and reclamation operation and for a period coincident with the operator's responsibility for revegetation. The Act contains no provision suggesting that the forfeiture of a performance bond creates a limitation upon the Federal regulation of a minesite subject to the Act.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

Release\_of

Release of a surface mining reclamation performance bond by a state does not reduce or affect the authority of the Office of Surface Mining Reclamation and Enforcement to regulate the miner. The fact of release of a performance bond is not relevant to the determination whether reclamation has properly been performed.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

BONDS--Continued

Release\_of--Continued

In order to meet the requirements for a Phase I bond release under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269 (1982), and 30 CFR 800.40(c)(1), the operator must show that he has completed the backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. Where the record on appeal is incomplete and discloses material issues of fact regarding compliance with the requirements for a Phase I bond release, the Board will refer the case to an Administrative Law Judge for hearing pursuant to 43 CFR 4.1286.

William Helton Pullen, Jr., et al., 112 IBLA 218 (Dec. 19, 1989)

CESSATION ORDERS

Generally

An authorized representative of the Secretary properly issues a cessation order under 30 CFR 843.11(a)(2) where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

Pursuant to sec. 525(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(c) (1982), an applicant for temporary relief from a cessation order or a notice of violation must show "that there is substantial likelihood that the findings of the Secretary will be favorable to him" and that "such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

(1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized but obligated to issue a cessation order for this failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulations 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v.  
Office of Surface Mining Reclamation & Enforcement, 181  
 97 IBLA 285 (May 18, 1987)  
 94 I.D. 181

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining  
Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

Grays Knob Coal Co. v. Office of Surface Mining  
Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

L.W. Overly Coal Co. v. Office of Surface Mining  
Reclamation & Enforcement, 103 IBLA 356 (Aug. 11, 1988)

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

Surface Mining Control and Reclamation Act of 1977,  
 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

Turner Brothers, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 101 IBLA 84 (Feb. 2, 1988)

Under regulation 30 CFR 843.11(a)(2) the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1), when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Firchau Mining, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

OSMRE has jurisdiction to issue a cessation order for failure to abate a violation contained in a notice of violation that is the subject of administrative review before the Office of Hearings and Appeals.

A cessation order issued for failure to abate a notice of violation shall be terminated when the violations listed in the notice of violation have been abated. 30 CFR 843.11(f).

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

A notice of violation must inform a party of the specific nature of the legal standard for which he is being cited, the specific condition at the minesite which has been found to constitute a violation, and the specific manner by which the condition may be abated. Similarly, a cessation order must inform a party of the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

particular legal standard at issue and the condition at the minesite which violates the standard.

Turner Brothers Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

When a permittee has failed to abate a violation within the abatement period stated in a notice of violation, OSMRE is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

When OSMRE and a coal company execute a comprehensive and detailed settlement agreement setting up a schedule of payment of specified reclamation fees and penalties due and owing to the Government, a cessation order outstanding at the time of execution, but not listed in the agreement, is not subject to that agreement.

Bright Coal Co., Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 104 IBLA 1 (Aug. 15, 1988)

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

Because conducting surface mining operations without a surface mining permit is specifically defined at 30 CFR 843.11(a)(2) to constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm, OSMRE may issue a cessation order solely on the grounds that surface mining operations are being conducted under a notice of intent to prospect.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988) 95 I.D. 293

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982) where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CESSATION ORDERS--Continued

Generally--Continued

Where a notice of violation has properly been issued citing an operator for failure to post an acceptable performance bond, and no acceptable bond is tendered within the maximum 90-day abatement period allowed to be afforded to the permittee to abate the violation pursuant to 30 CFR 843.12(c), OSMRE properly issues a cessation order for failure to abate a violation.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 153 (Dec. 7, 1989)

A notice of violation and cessation order will not be declared invalid because the permanent rather than interim regulations were cited, where conduct by an operator constitutes a violation of both permanent and interim regulations.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 166 (Dec. 11, 1989)

CITIZEN COMPLAINTS

Generally

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985) 92 I.D. 383

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

A decision of the Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action in response to a citizen's complaint stating that an operator has failed to comply with Federal and State requirements that the land be returned to approximate original contour, will be affirmed when the record establishes that the operator reclaimed the land in accordance with Federal and State regulations which allow an exemption from the approximate original contour requirements when the land has been previously mined.

Dennis Zaccagnini, 96 IBLA 97 (Mar. 9, 1987)

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

A decision by the Director, Office of Surface Mining Reclamation and Enforcement, or his delegate, in response to a citizen's complaint alleging that damage to a dwelling has been caused by blasting operations conducted by a surface coal mining operation, declining to take enforcement action pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (1982), is subject to appeal to the Board of Land Appeals. Where such a decision is based on a finding after inspection that the damage was not caused by blasting operations, the decision may be set aside and the case referred to an evidentiary hearing before an administrative law judge pursuant to 43 CFR 4.1286 where the issue of whether the blasting is a causative factor in the damage is a material issue of fact dispositive of the appeal.

Clifford Mackey et al., 99 IBLA 285 (Oct. 23, 1987)

When OSMRE issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSMRE's decision affirming the finding of the state regulatory authority that blasting operations did not cause the property damage and refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286 where there are material issues of fact as to whether the blasting operations were a causative factor in the damage.

Mr. & Mrs. William J. Hamilton, 105 IBLA 160 (Oct. 28, 1988)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CITIZEN COMPLAINTS--Continued

Generally--Continued

required by 30 CFR 780.18(b)(3) that further time is justified.

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

CIVIL PENALTIES

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

A document styled as an "application for review" filed within 30 days of receipt of a proposed assessment of a civil penalty will not be considered an application for review of a notice of violation or cessation order where the record shows the person filing the document was served with the notice of violation or cessation order more than 30 days prior to the filing; however, the document may be considered to be a petition for review of a proposed civil penalty.

Under sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of the civil penalty by one seeking review is essential to establish the jurisdiction of the Hearings Division to hear the petition for review or the Board of Land Appeals to entertain a petition for discretionary review.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement, Daryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 371 (July 1, 1986)

Where assessment of civil penalties comports with the procedures set out in 30 CFR Part 723, such assessment will not be disturbed on appeal absent a showing

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

that it was arbitrarily, capriciously, or unfairly imposed.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987)  
94 I.D. 181

When an Administrative Law Judge reduces the number of points assigned for a violation under 30 CFR 723.13(b) to fewer than 30, and that violation is not contained in a cessation order, the assessment of a civil penalty may be waived under 30 CFR 723.12(c). When the Administrative Law Judge declines to waive the penalty without providing a rationale, but the record demonstrates clearly that the permittee exercised diligence in attempting to prevent the violation, and demonstrated good faith in abating the violation, a civil penalty of \$240 is properly waived.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

L.W. Overly Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 356 (Aug. 11, 1988)

A person filing an application for review of a cessation order under 43 CFR 4.1160, shall file such application within 30 days of receipt of the order. A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

Where a mining permit requires a 25-foot-wide buffer zone between a natural drainage channel and the mining activity, testimony by an OSMRE inspector that a mine pit had been constructed within 5 to 10 feet of that channel and that the pit wall had slumped into the pit thereby diverting drainage in the channel into the pit will support a finding of violation and the assessment of an appropriate civil penalty.

A notice of violation issued to a company for mining without a permit will be sustained and an appropriate civil penalty assessed where the record shows that the road providing access to the company's permitted minesite also provided the only access to an unpermitted minesite; that access to the road was controlled by a locked gate to which the company had a key; that the company's sign was located at the gate; that the gate was kept locked to protect the company's equipment; and that one of the principals of the company owned the surface of the lands in question.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Generally--Continued

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where the only evidence relating to rapid compliance is that the violation was abated 1 day prior to the required time, the record does not support a deduction of any points for good faith.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Amount

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of \$750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

Under 43 CFR 4.1157, when an Administrative Law Judge in a civil penalty hearing finds a violation has occurred, he is to determine the amount of the penalty. He is not bound by the proposed assessment, regardless



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Amount--Continued

of whether an assessment conference has previously been held.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

When an Administrative Law Judge reduces the number of points assigned for a violation under 30 CFR 723.13(b) to fewer than 30, and that violation is not contained in a cessation order, the assessment of a civil penalty may be waived under 30 CFR 723.12(c). When the Administrative Law Judge declines to waive the penalty without providing a rationale, but the record demonstrates clearly that the permittee exercised diligence in attempting to prevent the violation, and demonstrated good faith in abating the violation, a civil penalty of \$240 is properly waived.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Amount--Continued

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

L.W. Overly Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 356 (Aug. 11, 1988)

An assignment of 15 points for probability of occurrence is proper where the violation cited is failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow and the evidence shows that suspended solids in amounts substantially greater than allowable limits were being carried off the permit area and into a nearby river.

The Board will reduce the points assigned for extent of potential or actual damage for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that, while damage would extend outside the permit area, there was no evidence as to the extent or duration of potential or actual damage.

When the Board of Land Appeals reduces the number of points assigned for a violation to fewer than 30, and that violation is not contained in a cessation order, in accordance with 30 CFR 723.12(c), the assessment of a civil penalty is discretionary and the factors in 30 CFR 723.13(b) are to be taken into consideration.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988)  
95 I.D. 181



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
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CIVIL PENALTIES--Continued

Amount--Continued

When OSMRE issues a notice of violation for livestock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining  
Reclamation & Enforcement, 107 IBLA 134 (Feb. 6,  
1989)

Under 30 CFR 845.13(b)(4)(i), from 1 to 10 points may be deducted in the assessment of a civil penalty where the person to whom the notice or order was issued achieved rapid compliance after notification of the violation. Rapid compliance requires that the person took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set. Where the only evidence relating to rapid compliance is that the violation was abated 1 day prior to the required time, the record does not support a deduction of any points for good faith.

Under 30 CFR 845.13(b)(3)(B), a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence. Where an Administrative Law Judge assigns 12 points for negligence based on his finding that the degree of negligence was "insignificant," either that finding or the assignment of 12 points is inappropriate since "insignificant" negligence would necessarily warrant an assignment of substantially less than 12 points.

An Administrative Law Judge's reduction of points from 13 to 1 for probability of occurrence based on a finding that the probability of occurrence of sediment leaving the permit area due to the failure to construct

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Amount--Continued

a sedimentation pond was insignificant will be affirmed on appeal where there is no evidence that sediment from the disturbed area had been carried off the permit area at the time of the OSMRE inspection and it was extremely doubtful that sediment would have been carried off the permit area prior to installation of the sedimentation pond which was approved, as part of a mining plan revision, on the date of the OSMRE inspection.

Farrell-Cooper Mining Co. v. Office of Surface Mining  
Reclamation & Enforcement, 111 IBLA 115 (Sept. 28,  
1989)

Hearings\_Procedure

Under 43 CFR 4.1157, when an Administrative Law Judge in a civil penalty hearing finds a violation has occurred, he is to determine the amount of the penalty. He is not bound by the proposed assessment, regardless of whether an assessment conference has previously been held.

A&S Coal Co. Inc. v. Office of Surface Mining Reclama-  
tion & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v.  
Office of Surface Mining Reclamation & Enforcement, 181  
97 IBLA 285 (May 18, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Hearings\_Procedure--Continued

Where OSMRE fails to issue a notice of proposed penalty assessment within 30 days of issuance of a notice of violation under 30 CFR 723.17(b), but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

As a matter of general policy announced by the Secretary of the Interior, if a person seeking administrative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Hearings\_Procedure--Continued

Where a petition for review of a proposed civil penalty is filed and full prepayment is made within the time period prescribed by 43 CFR 4.1141(b), in the Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia, the fact that the petition is not "accompanied by" the prepayment should not result in dismissal of the petition.

Fresa Construction Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229 (Feb. 26, 1988)

Negligence

Mitigating factors such as the diligence and good faith effort of the permittee to effect compliance are properly considered in determining the amount of a civil penalty assessed for a violation under sec. 518(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and 30 CFR 723.15(a). However, where failure of the permittee to abate the violation within the time allowed results in a failure-to-abate cessation order, sec. 518(h) of SMCRA and 30 CFR 723.15(b) provide no authority for mitigation of the statutory minimum penalty of \$750 per day on the basis of inability to comply.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 90 IBLA 186 (Jan. 28, 1986) 93 I.D. 1

Where the record in a civil penalty proceeding fails to show that a permittee's failure to abate OSMRE's notice of violation was the result of reckless, knowing, or intentional conduct, the assignment of 23 points in the negligence category is improper. However, where the record does show that the permittee was negligent, the case may be remanded to OSMRE for a proper assignment of points for negligence and the recalculation of the civil penalty.

Collins Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 25 (June 22, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Negligence--Continued

Under 30 CFR 845.13(b)(3)(B), a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence. Where an Administrative Law Judge assigns 12 points for negligence based on his finding that the degree of negligence was "insignificant," either that finding or the assignment of 12 points is inappropriate since "insignificant" negligence would necessarily warrant an assignment of substantially less than 12 points.

Farrell-Cooper Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Prepayment

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

Under sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of the civil penalty by one seeking review is essential to establish the jurisdiction of the Hearings Division to hear the petition for review

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Prepayment--Continued

or the Board of Land Appeals to entertain a petition for discretionary review.

Ben Collins v. Office of Surface Mining Reclamation & Enforcement, Daryl G. Hale v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 371 (July 1, 1986)

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

Where a petition for review of a proposed civil penalty is filed and full prepayment is made within the time period prescribed by 43 CFR 4.1141(b), in the Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia, the fact that the petition is not "accompanied by" the prepayment should not result in dismissal of the petition.

Fresa Construction Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229 (Feb. 26, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Probability of Occurrence

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining  
Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining  
Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Probability of Occurrence--Continued

An Administrative Law Judge's reduction of points from 13 to 1 for probability of occurrence based on a finding that the probability of occurrence of sediment leaving the permit area due to the failure to construct a sedimentation pond was insignificant will be affirmed on appeal where there is no evidence that sediment from the disturbed area had been carried off the permit area at the time of the OSMRE inspection and it was extremely doubtful that sediment would have been carried off the permit area prior to installation of the sedimentation pond which was approved, as part of a mining plan revision, on the date of the OSMRE inspection.

Farrell-Cooper Mining Co. v. Office of Surface Mining  
Reclamation & Enforcement, 111 IBLA 115 (Sept. 28, 1989)

Seriousness

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining  
Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

CIVIL PENALTIES--Continued

Seriousness--Continued

An assignment of 15 points for probability of occurrence is proper where the violation cited is failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow and the evidence shows that suspended solids in amounts substantially greater than allowable limits were being carried off the permit area and into a nearby river.

The Board will reduce the points assigned for extent of potential or actual damage for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that, while damage would extend outside the permit area, there was no evidence as to the extent or duration of potential or actual damage.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988) 95 I.D. 181

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

COAL EXPLORATION PERMITS

Generally

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

Coal may not be extracted for commercial sale under a notice of intent to prospect, unless the sale is to test for coal properties necessary for development of a mine, for which a surface mining permit application will later be submitted.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988) 95 I.D. 293

DISCOVERY

Generally

Where possible, in interpreting the Department's discovery rules under the Surface Mining Control and Reclamation Act of 1977, the body of case law which has evolved under the Federal Rules of Civil Procedure will be applicable.

An order by an Administrative Law Judge dismissing an application for review for failure to file answers to interrogatories, as directed, will be reversed on appeal where there is no evidence that the applicant's failure to file those answers prior to issuance of the order was a substantial error prejudicing OSM's case.

Gary Yeanev d.b.a. Black Hawk Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 18 (Apr. 22, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

DISCRIMINATION

Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

James E. Leber v. George Sterling et al., 88 IBLA 224 (Aug. 29, 1985) 92 I.D. 363

An Administrative Law Judge may refuse to take evidence on the issue of whether OSMRE failed to enforce a regulation against similarly situated operators, because the fact that OSMRE may not have enforced the regulation elsewhere or may have begun its enforcement of a regulation with a particular operator could not excuse the operator's failure to comply with its requirements.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, III IBLA 289 (Oct. 26, 1989)

EMPLOYEE PROTECTION

Generally

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

James E. Leber v. George Sterling et al., 88 IBLA 224 (Aug. 29, 1985) 92 I.D. 363

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES

Generally

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254 (1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

but obligated to issue a cessation order for this failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, the prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)  
94 I.D. 12

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 84 (Feb. 2, 1988)

"Good cause for such failure." As used in 30 CFR 843.12(b), the term "good cause for such failure" of a state regulatory authority to take appropriate action after the receipt of a 10-day notice does not include the legal inability of the agency to act, but rather is limited to a showing either that no violation existed or that the operation was not subject to the provisions of the Surface Mining Control and Reclamation Act of 1977.

As used in 30 CFR 843.12(b), the term "state program" must be interpreted as including within its ambit so much of the initial Federal performance standards as continued to apply to mining operations

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

within the State after the approval of the State permanent program.

Where an operator has actual knowledge that religious services are being conducted in a building, the operator will not be heard to argue that the building was not a "church" within the meaning of 30 CFR 15.19(e)(2)(ii)(B)(1).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 167 (Feb. 17, 1988)

OSMRE has jurisdiction to issue a cessation order for failure to abate a violation contained in a notice of violation that is the subject of administrative review before the Office of Hearings and Appeals.

A cessation order issued for failure to abate a notice of violation shall be terminated when the violations listed in the notice of violation have been abated. 30 CFR 843.11(f).

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

When a party to an adversary proceeding within the Department and a Departmental agency acting through its attorneys in the Office of the Solicitor reach and sign a compromise agreement concerning that proceeding and an Administrative Law Judge issues a consent decision approving that agreement, the parties are bound to the terms of the agreement as a matter of contract.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

Where an operator begins excavation of coal on Federal lands without a Federal permit, negotiates with OSMRE to suspend enforcement action pending litigation in Federal court of the need for a Federal permit, and ceases operations in reliance upon the agreement, OSMRE is bound by the terms of the agreement made with the operator and may not issue a notice of violation for conditions created by the agreement itself.

Gabriel Energy Corp. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 53 (Oct. 17, 1988)

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement period, rather than due to adverse climatological conditions.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 174 (Feb. 13, 1989)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENFORCEMENT PROCEDURES--Continued

Generally--Continued

of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

A state with an approved program is responsible for carrying out the provisions of SMCRA. This charge will obviously be unfulfilled if OSMRE allows the state to maintain a position contrary to that Act. When the State has clearly demonstrated that it does not intend to enforce its program, and the course of action adopted by the state renders it impossible for an operator to legally undertake operations which would otherwise be permitted, OSMRE is required to institute proceedings pursuant to the provisions of 30 U.S.C. § 1271(b) (1982).

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

The Secretary of the Interior through OSMRE may issue notices of violation in states with approved programs, where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) and, after OSMRE issues a 10-day notice, the state fails to take action to ensure abatement of the violation.

An Administrative Law Judge may refuse to take evidence on the issue of whether OSMRE failed to enforce a regulation against similarly situated operators, because the fact that OSMRE may not have enforced the regulation elsewhere or may have begun its enforcement of a regulation with a particular operator could not excuse the operator's failure to comply with its requirements.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENVIRONMENTAL HARM

Generally

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulations 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ENVIRONMENTAL HARM--Continued

Generally--Continued

Under regulation 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1), when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

EVIDENCE

Generally

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to obtain prior approval for the construction of small depressions where there is no proof that the permittee, whether by design or otherwise, actually constructed the depressions.

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

Where the evidence demonstrates that reclamation has not occurred as set forth in the currently approved permit, a notice of violation issued for this failure will be upheld.

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

EVIDENCE--Continued

Generally--Continued

Where the evidence in a case shows the complete merger of the ownership and control of a corporation, such that the corporation is merely acting as the individual's alter ego, the individual cannot be allowed to escape responsibility for the statutory requirement to eliminate highwalls by hiding behind the corporate entity.

Shelbiana Construction Co. v. Office of Surface Mining Reclamation & Enforcement, Sammy Goff v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 19 (Apr. 6, 1988)

Where there is conflicting evidence regarding the existence of a sedimentation pond, that conflict need not be resolved where, even accepting the existence of a pond, the record shows that the pond was located off the permit area, and there is testimony that surface drainage left the permit area without passing through a sedimentation pond in violation of 30 CFR 715.17(a).

Where a mining permit requires a 25-foot-wide buffer zone between a natural drainage channel and the mining activity, testimony by an OSMRE inspector that a mine pit had been constructed within 5 to 10 feet of that channel and that the pit wall had slumped into the pit thereby diverting drainage in the channel into the pit will support a finding of violation and the assessment of an appropriate civil penalty.

A notice of violation issued to a company for mining without a permit will be sustained and an appropriate civil penalty assessed where the record shows that the road providing access to the company's permitted minesite also provided the only access to an unpermitted minesite; that access to the road was controlled by a locked gate to which the company had a key; that the company's sign was located at the gate; that the gate was kept locked to protect the company's equipment; and that one of the principals of the company owned the surface of the lands in question.

CSN Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

EVIDENCE--Continued

Generally--Continued

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Where OSMRE fails to present evidence showing that rills and gullies found at a minesite are greater than 9 inches deep, it has not met its burden of establishing a prima facie case that the terms of 30 CFR 715.14(i) have been violated.

A failure to comply with 30 CFR 715.20(a)(1) (requiring establishment of a diverse, effective, and permanent vegetative cover on disturbed lands) will not be excused on the ground that the permittee took adequate steps to comply and would have achieved compliance but for drought conditions beyond his control, where the permittee did not show at the hearing that it would have achieved compliance but for the drought, where the record shows that previous efforts to reseed had been inadequate, and where the OSMRE inspector testifies that reseeding may have failed because of poor, acidic soil conditions at the site.

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

Coal Energy, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

EVIDENCE--Continued

Generally--Continued

Timely performance of abatement activities required by a notice of violation cannot be considered as a stipulation by the permittee that the notice was validly issued.

Turner Brothers, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

An Administrative Law Judge may refuse to take evidence on the issue of whether OSMRE failed to enforce a regulation against similarly situated operators, because the fact that OSMRE may not have enforced the regulation elsewhere or may have begun its enforcement of a regulation with a particular operator could not excuse the operator's failure to comply with its requirements.

Donaldson Creek Mining Co. v. Office of Surface Mining  
Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

FEDERAL LANDS

Cooperative Agreements

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL LANDS--Continued

Cooperative Agreements--Continued

prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)  
 93 I.D. 417

Mining Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)  
 93 I.D. 417

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL LANDS--Continued

Permits

"All anticipated mining." In the absence of either a statutory or regulatory definition of "all anticipated mining," OSM's 1981 interpretation of that phrase in secs. 507(b)(11) and 510(b)(3), 30 U.S.C. § 1257(b)(11) and 30 U.S.C. § 1260(b)(3) (1982), to include all future mining for which a permit application had been filed, as well as all present mining, was a reasonable construction. Subsequent to OSM's interpretation, this term was defined at 30 CFR 701.5 under the heading "cumulative impact area" to include, in addition to the above, all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

Description of ground water basins or systems is an informational requirement which must be fulfilled by the coal mining permit applicant as part of its responsibility to provide sufficient data so the regulatory authority may make its probable cumulative impact assessment.

There is no merit to an argument by one challenging the 1981 issuance of a permit to mine coal that certain areas should have been included in OSM's probable cumulative impact assessment as a control watershed in the absence of a regulatory requirement for such information.

Neither sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), nor applicable regulations require OSM to set forth the baseline data used in making its assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. The applicant for a permit has the duty to describe baseline data.

Neither sec. 507(b)(11), 30 U.S.C. § 1257(b)(11) (1982), nor applicable regulations require OSM to develop information for use in its assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. OSM's obligation is to provide only that information which is available from appropriate governmental agencies. If

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL LANDS--Continued

Permits--Continued

such information is not available, the permit applicant must gather the necessary information and submit it with the application.

An assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance does not satisfy sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), where the regulatory authority fails to set forth reasons for its finding that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. An assessment pursuant to sec. 510(b)(3) of the Act must include, inter alia, a discussion by the regulatory authority of ground water.

A determination by OSM in the issuance of a permit to conduct underground coal mining operations to allow 50-percent extraction of coal under a landslide area will be upheld where one challenging such a determination fails to present any persuasive evidence that it was error.

A 1979 environmental impact statement describing both site-specific and aggregate effects of coal mining does not require supplementation in the absence of significant change in the proposed operation.

Sec. 510(b)(1), 30 U.S.C. § 1260(b)(1) (1982), requires that no permit shall be approved unless there has been compliance with all the requirements of the Act and the State or Federal program. Where a regulatory requirement is unsatisfied at the time of permit issuance and the regulatory authority seeks to satisfy that requirement by the imposition of a stipulation to the permit, sec. 510(b)(1) of the Act has been violated.

In response to the decision by Judge Thomas Flannery in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. Feb. 26, 1980), suspending the term "mine plan area" in the regulations, the Department amended its regulations to limit the area for which a determination of the probable hydrologic consequences must be made by the applicant. This determination is restricted by regulation 30 CFR 784.14(e)(1) (1983) to the proposed permit and adjacent areas. This regulation was subsequently remanded to the Department by Judge Flannery in In re: Permanent

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL LANDS--Continued

Permits--Continued

Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. July 15, 1985).

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 1 (Sept. 27, 1985) 92 I.D. 389

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL LANDS--Continued

Permits--Continued

the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)  
93 I.D. 417

The regulations at 43 CFR 4.1360-4.1369 govern proceedings on review of approval or disapproval of applications for new surface mining permits on Federal lands and Indian lands. Any order or decision of an Administrative Law Judge disposing of a permit review proceeding is subject to review only pursuant to a petition for discretionary review filed with the Board within 30 days of receipt of the decision under the regulation at 43 CFR 4.1369(a).

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 329 (Mar. 10, 1989)

FEDERAL PROGRAM

Generally

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc. & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL PROGRAM--Continued

Generally--Continued

Under 43 U.S.C. § 1276(a)(1) (1982), judicial review of the validity of regulations promulgated under the Surface Mining Control and Reclamation Act of 1977 is available only in the United States District Court for the District of Columbia, and the Interior Board of Land Appeals will not entertain arguments based on claims as to the invalidity of regulations promulgated under that Act.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Existence of Mining Operations

The Office of Surface Mining Reclamation and Enforcement has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in 30 U.S.C. § 1267(a) (1982). In regard to inspections, the only issue as to "subject matter jurisdiction" would be a claim that the site inspected is outside the scope of the Surface Mining Control and Reclamation Act of 1977 because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Permits

Under regulation 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1), when a condition or practice exists which causes or can reasonably be



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

FEDERAL PROGRAM--Continued

Permits--Continued

expected to cause significant, imminent environmental harm to land, air, or water resources.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

Prohibition of Mining Operations

Regulation 30 CFR 942.764(c) is properly construed to mean that final unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated.

Frozen Head State Park Ass'n. et al., 102 IBLA 32 (Apr. 7, 1988)

HEARINGS

Generally

Under 43 CFR 4.1271(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition must be denied.

Tri Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 85 IBLA 146 (Feb. 21, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Generally--Continued

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 194 (Aug. 15, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 365 (Jan. 12, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 10 (June 22, 1988)

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

In a hearing on an application for review of a notice of violation or cessation order, OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

Mullins Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 333 (Apr. 7, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Generally--Continued

In a civil penalty proceeding OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. If that showing goes un rebutted, it will sustain the violation.

A&S Coal Co. Inc. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 338 (Apr. 7, 1987)

Where the pleadings reveal that no material issue of fact is in dispute, no hearing is required to be held by the Administrative Law Judge, notwithstanding the terms of 30 U.S.C. § 1275 (1982), to a providing an opportunity for a public hearing or permittee seeking review of a cessation order or notice of violation.

A person filing an application for review of a cessation order under 43 CFR 4.1160, shall file such application within 30 days of receipt of the order. A petition for review of a proposed assessment of a civil penalty must be filed within 30 days of receipt of the proposed assessment.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

It is improper to impose a time limit on raising the question of a lack of jurisdiction of OHA, and any pending administrative review proceeding must be dismissed (either by an Administrative Law Judge or the Board of Land Appeals) upon discovery that OHA lacks jurisdiction. The obligation to dismiss the proceeding applies whether or not the lack of jurisdiction was affirmatively raised by a party, and a party's failure to assert lack of jurisdiction at the beginning of administrative review will not result in a waiver of its right to do so at a later time or diminish the obligation of the administrative forum to dismiss the proceeding.

Where an application for review is not filed within 30 days of receipt of a notice of violation or cessation order (as expressly required by 43 CFR

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Generally--Continued

4.1162(a)), OHA is deprived of jurisdiction to consider the application. It is error for an Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications.

McPeck Mining & Mark E. McPeck v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 389 (Mar. 31, 1988)

When a party reaches an agreement with the Office of Surface Mining Reclamation and Enforcement and withdraws its application for review of a notice of violation, the decision of an Administrative Law Judge dismissing the application is final unless appealed. As a consequence of the dismissal, there is no longer an application for review pending in the Office of Hearings and Appeals, and issues as to the contents of the NOV may no longer be raised, absent a showing of compelling equitable or legal reasons why the dismissal should be set aside.

The Office of Surface Mining Reclamation and Enforcement has "jurisdiction" over all surface coal mining and reclamation operations when inspecting for the purposes stated in 30 U.S.C. § 1267(a) (1982). In regard to inspections, the only issue as to "subject matter jurisdiction" would be a claim that the site inspected is outside the scope of the Surface Mining Control and Reclamation Act of 1977 because it is not a surface coal mining or reclamation operation, is not engaged in any activity connected with a surface coal mine, or does not otherwise come under the provisions of the Surface Mining Control and Reclamation Act of 1977.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Generally--Continued

Where OSMRE issues a notice of violation and more than 5 years later during a hearing held pursuant to the filing of a petition for review of a civil penalty based on that notice and a subsequent cessation order, the permittee raises for the first time lack of service of the notice of violation, that issue will be considered not timely raised. By failing to raise the issue in its petition or an amendment thereto, the permittee waived its opportunity subsequently to challenge service.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

At a hearing, OSMRE has the burden of going forward to establish a prima facie case as to the validity of the notice of violation by the submission of sufficient evidence to establish the essential facts of the violation. However, the ultimate burden of persuasion rests with the applicant for review. If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 166 (Dec. 11, 1989)

In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. If OSMRE meets its burden, the ultimate

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Generally--Continued

burden of persuasion rests with the applicant for review.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

In order to meet the requirements for a Phase I bond release under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1269 (1982), and 30 CFR 800.40(c)(1), the operator must show that he has completed the backfilling, regrading (which may include the replacement of topsoil), and drainage control of the bonded area in accordance with the approved reclamation plan. Where the record on appeal is incomplete and discloses material issues of fact regarding compliance with the requirements for a Phase I bond release, the Board will refer the case to an Administrative Law Judge for hearing pursuant to 43 CFR 4.1286.

William Helton Pullen, Jr., et al., 112 IBLA 218 (Dec. 19, 1989)

Procedure

Timely prepayment of the amount of a proposed civil penalty by one seeking formal review of the penalty before an Administrative Law Judge is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where petitioner makes prepayment after the deadline for filing the petition prescribed by 43 CFR 4.1151 and misfiles the prepayment with the Office of Surface Mining Reclamation and Enforcement rather than with the Office of Hearings and Appeals, the petition for review is properly dismissed by the Hearings Division, and the Board of Land Appeals has no jurisdiction to entertain a petition for discretionary review of the order of dismissal.

As a matter of general policy announced by the Secretary of the Interior, if a person seeking administrative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HEARINGS--Continued

Procedure--Continued

and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished.

Bill Smith Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 224 (Feb. 26, 1988)

Where a petition for review of a proposed civil penalty is filed and full prepayment is made within the time period prescribed by 43 CFR 4.1141(b), in the Hearings Division, Office of Hearings and Appeals, in Arlington, Virginia, the fact that the petition is not "accompanied by" the prepayment should not result in dismissal of the petition.

Fresa Construction Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229 (Feb. 26, 1988)

HYDROLOGIC SYSTEM PROTECTION

Generally

"All anticipated mining." In the absence of either a statutory or regulatory definition of "all anticipated mining," OSM's 1981 interpretation of that phrase in secs. 507(b)(11) and 510(b)(3), 30 U.S.C. § 1257(b)(11) and 30 U.S.C. § 1260(b)(3) (1982), to include all future mining for which a permit application had been filed, as well as all present mining, was a reasonable construction. Subsequent to OSM's interpretation, this term was defined at 30 CFR 701.5 under the heading "cumulative impact area" to include, in addition to the above, all operations required to meet diligent development requirements for leased

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

Federal coal for which there is actual mine development information available.

Description of ground water basins or systems is an informational requirement which must be fulfilled by the coal mining permit applicant as part of its responsibility to provide sufficient data so the regulatory authority may make its probable cumulative impact assessment.

There is no merit to an argument by one challenging the 1981 issuance of a permit to mine coal that certain areas should have been included in OSM's probable cumulative impact assessment as a control watershed in the absence of a regulatory requirement for such information.

Neither sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), nor applicable regulations require OSM to set forth the baseline data used in making its assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. The applicant for a permit has the duty to describe baseline data.

Neither sec. 507(b)(11), 30 U.S.C. § 1257(b)(11) (1982), nor applicable regulations require OSM to develop information for use in its assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. OSM's obligation is to provide only that information which is available from appropriate governmental agencies. If such information is not available, the permit applicant must gather the necessary information and submit it with the application.

An assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance does not satisfy sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), where the regulatory authority fails to set forth reasons for its finding that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. An assessment pursuant to sec. 510(b)(3)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

of the Act must include, inter alia, a discussion by the regulatory authority of ground water.

A determination by OSM in the issuance of a permit to conduct underground coal mining operations to allow 50-percent extraction of coal under a landslide area will be upheld where one challenging such a determination fails to present any persuasive evidence that it was error.

A 1979 environmental impact statement describing both site-specific and aggregate effects of coal mining does not require supplementation in the absence of significant change in the proposed operation.

Sec. 510(b)(1), 30 U.S.C. § 1260(b)(1) (1982), requires that no permit shall be approved unless there has been compliance with all the requirements of the Act and the State or Federal program. Where a regulatory requirement is unsatisfied at the time of permit issuance and the regulatory authority seeks to satisfy that requirement by the imposition of a stipulation to the permit, sec. 510(b)(1) of the Act has been violated.

In response to the decision by Judge Thomas Flannery in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. Feb. 26, 1980), suspending the term "mine plan area" in the regulations, the Department amended its regulations to limit the area for which a determination of the probable hydrologic consequences must be made by the applicant. This determination is restricted by regulation 30 CFR 784.14(e)(1) (1983) to the proposed permit and adjacent areas. This regulation was subsequently remanded to the Department by Judge Flannery in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. July 15, 1985).

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 1 (Sept. 27, 1985) 92 I.D. 389

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986) 93 I.D. 417

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

The requirement of 30 CFR 715.17(a)(1), that all surface drainage from the disturbed area be passed through a sedimentation pond before it leaves the permit area is a preventive measure; a showing of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the regulation.

The elements of proof of a violation of the sedimentation pond requirements are: (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left or will leave the permit area.

Under 30 CFR 715.17(a), the regulatory authority may grant exemptions from the requirement that drainage from disturbed areas be passed through a sedimentation pond, but only on the basis of a permittee's showings (1) that the disturbed drainage area within the total disturbed area is small, and (2) that a sedimentation pond is not necessary to meet effluent limitations and to maintain water quality in downstream receiving waters.

Alpine Construction Corp. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 128 (Feb. 8, 1988)  
 95 I.D. 16

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

The sedimentation pond requirement is a preventive measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 299 (May 31, 1988)  
 95 I.D. 75

Where there is conflicting evidence regarding the existence of a sedimentation pond, that conflict need not be resolved where, even accepting the existence of a pond, the record shows that the pond was located off the permit area, and there is testimony that surface drainage left the permit area without passing through a sedimentation pond in violation of 30 CFR 715.17(a).

Where a mining permit requires a 25-foot-wide buffer zone between a natural drainage channel and the mining activity, testimony by an OSMRE inspector that a mine pit had been constructed within 5 to 10 feet of that channel and that the pit wall had slumped into the pit thereby diverting drainage in the channel into the pit will support a finding of violation and the assessment of an appropriate civil penalty.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

A prima facie case that surface drainage left the permit area, may be established by evidence of present or past drainage from a disturbed area flowing off the permit area. Alternatively, a prima facie case may be established by demonstrating that, under the conditions existing at the minesite at the time of inspection, there is a reasonable likelihood that surface



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

drainage from a disturbed area would leave the permit area without passing through a sedimentation pond.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)

Where an Administrative Law Judge upholds a notice of violation issued on the basis that discharges from a permittee's sedimentation ponds had reaffected downslope areas outside the permit area by causing erosion, but the evidence submitted at a hearing on the notice of violation establishes that previous mine operators had placed spoil on the downslope; that they had abandoned the minesite without stabilizing or reclaiming the downslope area; that the permittee did not commence its operations until many months after abandonment; and there is testimony that there were no discharges from those ponds, the Administrative Law Judge's decision will be reversed.

H&B Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 286 (Aug. 3, 1988)

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

OSMRE properly issues a notice of violation for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that water used to control dust on the permittee's access road was carrying suspended solids in excess of the allowable limit set by 30 CFR 717.17(a)(3) off the permit area and into the river.

As a general rule, where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed by the permittee's operations, the discharge from the sedimentation pond must meet the effluent limitations of the regulation of the pond. However, where a person charged with a violation of the effluent limitation can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations, the person may escape responsibility for the violation. However, a failure to provide such evidence will result in an affirmation of the violation.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988) 95 I.D. 181

A permittee must comply with the surface and ground water monitoring requirements of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations until the successful completion of all reclamation necessary and incident to its past surface coal mining operations and appropriate release of its performance bond, even where

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

current mining operations might be considered exempt from regulation under that Act.

McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 29 (Oct. 14, 1988)

No violation of the Surface Mining Control and Reclamation Act of 1977 occurred where, during the interim program for the regulation of surface coal mining in Pennsylvania, surface drainage was passed from one permit area to an adjacent permit and then passed through a sedimentation pond before leaving the second permit area, where both permit areas were within the same mine drainage permit issued by the state regulatory authority.

Thompson Brothers Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 69 (Oct. 18, 1988)

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

A determination that approval of a permit for a coal preparation plant will not have a significant impact on groundwater, based on an environmental assessment, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been undertaken; relevant environmental

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

HYDROLOGIC SYSTEM PROTECTION--Continued

Generally--Continued

concerns have been identified; and the final determination is reasonable in light of the environmental analysis.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

OSMRE properly denies an application for permit revision when the applicant does not provide sufficient operational data to demonstrate that reclamation, as required by SMCRA and the Tennessee Federal program, can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Under 30 U.S.C. § 1265(b)(10)(A) (1982), and 30 CFR 816.41(f), OSMRE is required to avoid acid or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 239 (Oct. 24, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
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IMPOUNDMENTS

Generally

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

30 CFR 715.14(e) is an initial program regulation that requires that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour. Compliance with a state permit allowing an

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

IMPOUNDMENTS--Continued

Generally--Continued

underwater highwall does not excuse failure to comply with this regulation.

"Appropriate contour." "Appropriate contour" in 30 CFR 715.14(e) is not synonymous with "approximate original contour," but the regulation requires that all highwalls be eliminated by grading.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

INITIAL REGULATORY PROGRAM

Generally

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INITIAL REGULATORY PROGRAM--Continued

Generally--Continued

evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987)  
94 I.D. 181

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i) and up to seven points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Whether particular reclamation work is timely must be determined by taking into account the overall circumstances of a surface coal mining and reclamation operation.

Clear Creek Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 6 (Jan. 22, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INITIAL REGULATORY PROGRAM--Continued

Generally--Continued

Sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), authorizes the Secretary to issue a notice of violation to a permittee who is in violation of any requirement of the Act or any permit condition required by the Act.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

Whether particular reclamation work is timely must be determined by taking into account the overall circumstances of a surface coal mining and reclamation operation.

An extension of time in which to reclaim a mine-site granted by the State does not excuse noncompliance with the initial Federal performance standards relating to reclamation.

Alabama By-Products Corp. & Drummond Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 264 (Aug. 1, 1988)

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INITIAL REGULATORY PROGRAM--Continued

Generally--Continued

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

INSPECTIONS

Generally

Warrantless inspections under the Surface Mining Control and Reclamation Act of 1977 are constitutionally permissible.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

Generally--Continued

danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

Generally--Continued

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

The Secretary of the Interior through OSMRE has jurisdiction to issue a notice of violation in states with approved programs, where OSMRE, acting pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issues a 10-day notice and the State fails to take appropriate action to ensure abatement of the violation or show good cause for its failure.

OSMRE may properly issue a notice of violation when, following a 10-day notice to the State regulatory authority, the State declines to correct a revegetation violation on the basis that it lacks jurisdiction to act following bond release.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

Generally--Continued

OSMRE inspectors are not required by sec. 517(b)(3) of the Act to present their credentials prior to inspecting an inactive minesite at which no one associated with the mining operation is present.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2) OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

Save Our Cumberland Mountains, Inc., 108 IBLA 70 (Mar. 23, 1989) 96 I.D. 139



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

Generally--Continued

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned mine site and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

10-day\_Notice to\_State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)  
 93 I.D. 199

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

10-day\_Notice to\_State--Continued

The Secretary of the Interior through OSM properly has jurisdiction to issue notices of violation in states with approved programs, where OSM acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSM issues a 10-day notice and the State fails to take action to ensure abatement of the violations.

Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)  
 94 I.D. 12

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

"Good cause for such failure." As used in 30 CFR 843.12(b), the term "good cause for such failure" of a state regulatory authority to take appropriate action after the receipt of a 10-day notice does not include the legal inability of the agency to act, but rather is limited to a showing either that no violation existed or that the operation was not subject to the provisions of the Surface Mining Control and Reclamation Act of 1977.

As used in 30 CFR 843.12(b), the term "state program" must be interpreted as including within its ambit so much of the initial Federal performance standards as continued to apply to mining operations

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

within the State after the approval of the State permanent program.

Where an operator has actual knowledge that religious services are being conducted in a building, the operator will not be heard to argue that the building was not a "church" within the meaning of 30 CFR 715.19(e)(2)(ii)(B)(1).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 167 (Feb. 17, 1988)

OSMRE may properly find that a state has not taken appropriate action to correct a violation where the state has granted an extended abatement period to a permittee without requiring the permittee, contrary to state regulations, to document the basis for its extension request and, following a 10-day notice, has taken no remedial action. Upon such a finding, OSMRE shall inspect the permittee's operation and, if the underlying violation continues, issue a notice of violation.

Collins Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 25 (June 22, 1988)

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988) 95 I.D. 293



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n. et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

The Secretary of the Interior through OSMRE may issue notices of violation in states with approved programs, where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) and, after OSMRE issues a 10-day notice, the state fails to take action to ensure abatement of the violation.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

NOTICES OF VIOLATION

Generally

The Office of Surface Mining Reclamation and Enforcement may not vacate a notice of violation while an application for review of the notice of violation is pending before an Administrative Law Judge. When

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

an application for review is timely filed, jurisdiction over the subject matter is lodged in the reviewing official or tribunal, and only that official or tribunal has the authority to vacate the notice of violation.

Gateway Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 371 (Jan. 25, 1985)

Pursuant to sec. 525(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(c) (1982), an applicant for temporary relief from a cessation order or a notice of violation must show "that there is substantial likelihood that the findings of the Secretary will be favorable to him" and that "such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254 (1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized but obligated to issue a cessation order for this failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

An application for review of a cessation order will be dismissed as untimely filed if the application is filed more than 30 days after receipt of the order. Such application is properly filed with the Hearings Division, Office of Hearings and Appeals. The effective filing date for documents initiating proceedings before the Hearings Division shall be the date of receipt in that office, if filed by hand, or the date such document is postmarked, if filed by mail.

Coal Energy, Inc., 94 IBLA 347 (Nov. 28, 1986)

The Board will reverse an order of an administrative law judge dismissing an application for review of a notice of violation for failure to respond timely to a show cause order which concluded that the applicant had failed to allege facts entitling the applicant to administrative relief, in compliance with 43 CFR 4.1164, where the application was sufficient in that respect. The case will be remanded for further administrative proceedings.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 78 (Apr. 28, 1987)

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987)  
94 I.D. 181

When reviewing a failure to abate cessation order, the Administrative Law Judge has no authority to consider questions regarding the jurisdictional authority of OSMRE to issue the underlying notice of violation if the permittee failed to timely seek review of the notice of violation.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

Where OSMRE fails to issue a notice of proposed penalty assessment within 30 days of issuance of a notice of violation under 30 CFR 723.17(b), but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

Grays Knob Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 171 (June 24, 1987)

OSMRE has jurisdiction to issue a notice of violation of a State permanent regulatory program where OSMRE has assumed direct Federal enforcement of the State program pursuant to public notice duly published in the Federal Register.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 84 (Feb. 2, 1988)

Sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), authorizes the Secretary to issue a notice of violation to a permittee who is in violation of any requirement of the Act or any permit condition required by the Act.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

Where the evidence demonstrates that reclamation has not occurred as set forth in the currently approved permit, a notice of violation issued for this failure will be upheld.

OSMRE has jurisdiction to issue a cessation order for failure to abate a violation contained in a notice of violation that is the subject of administrative review before the Office of Hearings and Appeals.

A cessation order issued for failure to abate a notice of violation shall be terminated when the violations listed in the notice of violation have been abated. 30 CFR 843.11(f).

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

A notice of violation must inform a party of the specific nature of the legal standard for which he is being cited, the specific condition at the minesite which has been found to constitute a violation, and the specific manner by which the condition may be abated. Similarly, a cessation order must inform a party of the particular legal standard at issue and the condition at the minesite which violates the standard.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

OSMRE may properly find that a state has not taken appropriate action to correct a violation where the state has granted an extended abatement period to a permittee without requiring the permittee, contrary to state regulations, to document the basis for its extension request, and, following a 10-day notice, has taken no remedial action. Upon such a finding, OSMRE shall inspect the permittee's operation and, if the underlying violation continues, issue a notice of violation.

Collins Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 25 (June 22, 1988)

Where an Administrative Law Judge upholds a notice of violation issued on the basis that discharges from a permittee's sedimentation ponds had reaffected downslope areas outside the permit area by causing erosion, but the evidence submitted at a hearing on the notice of violation establishes that previous mine operators had placed spoil on the downslope; that they had abandoned the minesite without stabilizing or reclaiming the downslope area; that the permittee did not commence its operations until many months after abandonment; and there is testimony that there were no discharges from those ponds, the Administrative Law Judge's decision will be reversed.

H&B Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 286 (Aug. 3, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

Where the permittee has failed to abate a violation within the time set for abatement in a notice of violation, the Office of Surface Mining Reclamation and Enforcement is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

The Board has no authority to waive or reduce a civil penalty assessed at the statutory minimum pursuant to sec. 518(h) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(h) (1982), and 30 CFR 723.15(b) for failure to abate a violation within the time allowed.

L.W. Overly Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 356 (Aug. 11, 1988)

When a permittee has failed to abate a violation within the abatement period stated in a notice of violation, OSMRE is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (1982), to issue a cessation order.

When OSMRE and a coal company execute a comprehensive and detailed settlement agreement setting up a schedule of payment of specified reclamation fees and penalties due and owing to the Government, a cessation order outstanding at the time of execution, but not listed in the agreement, is not subject to that agreement.

Bright Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 1 (Aug. 15, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

The Office of Surface Mining Reclamation and Enforcement properly issued a Notice of Violation for failure to comply with 30 CFR 942.800(b)(3) where an operator did not post an acceptable new bond within 30 days of the effective date of the Federal program in Tennessee.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 24 (Aug. 19, 1988)

In a proceeding concerning an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSMRE. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSMRE meets its burden of establishing a prima facie case. OSMRE makes a prima facie case when it presents sufficient evidence to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

Where OSMRE fails to present evidence showing that rills and gullies found at a minesite are greater than 9 inches deep, it has not met its burden of establishing a prima facie case that the terms of 30 CFR 715.14(i) have been violated.

A failure to comply with 30 CFR 715.20(a)(1) (requiring establishment of a diverse, effective, and permanent vegetative cover on disturbed lands) will not be excused on the ground that the permittee took adequate steps to comply and would have achieved compliance but for drought conditions beyond his control, where the permittee did not show at the hearing that it would have achieved compliance but for the drought, where the record shows that previous efforts to reseed had been inadequate, and where the OSMRE inspector testifies that reseeding may have failed because of poor, acidic soil conditions at the site.

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

One of the principles of res judicata and collateral estoppel is that the question expressly and definitely presented in the current litigation must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation. Accordingly, the doctrines of res judicata and collateral estoppel cannot preclude OSMRE from issuing a notice of violation, enforcing a cessation order, or assessing penalties therefor if the previous violation cited by the State differs from the violation cited by OSMRE and the violation cited by OSMRE was not adjudicated before the state agency.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Generally--Continued

OSMRE will not be deemed collaterally estopped from issuing a notice of violation and cessation order for the failure to eliminate all highwalls in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982), where the State and Federal enforcement actions did not arise from the same operative facts.

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Where the evidence establishes that operations under the initial regulatory program adversely affected a pre-existing highwall by cutting into the highwall, appellant has "used or disturbed" the highwall and was required, under the interim regulations, to eliminate the orphan highwall.

Josephine Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 316 (Oct. 30, 1989)

A notice of violation and cessation order will not be declared invalid because the permanent rather than interim regulations were cited, where conduct by an operator constitutes a violation of both permanent and interim regulations.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 166 (Dec. 11, 1989)

Permittees

Under sec. 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1982), a permittee of a mine site is a proper party to be cited for a violation of the Act notwithstanding the fact the coal was removed by a third party. Pursuant to sec. 511(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1261(b) (1982), a permittee may not transfer, assign, or sell rights granted under any permit without the written approval

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Permittees--Continued

of the regulatory authority. Hence, a purported assignment of the permittee's rights under the permit to a third party will not suffice to relieve the permittee of liability for violations of the Act in the absence of an approved assignment.

Clark Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 93 (Apr. 15, 1988)

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

Remedial Actions

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Remedial Actions--Continued

A permittee will be deemed to have abated a violation of 30 CFR 715.14(i) for failure to regrade and stabilize rills and gullies on the permit area deeper than 9 inches where the notice of violation was modified by agreement of the parties at a hearing to require stabilizations by placing straw bales at strategic locations and the evidence establishes that the permittee has stabilized the rills and gullies.

A permittee will be deemed to have abated a violation of 30 CFR 715.17(a) for failure to pass all drainage from the disturbed area through a sedimentation pond before leaving the permit area where the notice of violation was modified by agreement of the parties at a hearing to require construction of a sedimentation ditch using straw bales and the evidence establishes that the permittee constructed a berm and filter barrier which was the functional equivalent of the agreed-upon structure.

Palmer Coking Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 96 IBLA 266 (Mar. 26, 1987)

The requirement of 30 CFR 715.14(e) that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour is the proper remedial action to prescribe in a notice of violation issued to an initial regulatory program operation. Revising a notice of violation to prescribe this requirement, rather than that of 30 CFR 816.49(a)(9) applicable to a permanent program operation, is not a retroactive imposition of a new requirement.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

Specificity

A notice of violation issued pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), which does not set forth with reasonable

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

NOTICES OF VIOLATION--Continued

Specificity--Continued

specificity the nature of the alleged violation is properly vacated.

Office of Surface Mining Reclamation & Enforcement v. Ewell L. Spradlin Coal Co., 93 IBLA 386 (Sept. 17, 1986)

A violation is described with reasonable specificity and satisfies the requirements of sec. 521(a)(5) of the Act where a surface mining site has been subdivided into separate sections, and specific findings as to highwalls and remedial work required are made with respect to such sections. An allegation on appeal that such findings are either indefinite or provide inadequate notice will not be sustained where, during the course of the proceeding, two hearings were held, the operator was given ample opportunity to present all aspects of his case, and, after the decisions were rendered, failed to utilize the opportunity to seek clarification of what reclamation work was required.

St. Charles Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 94 IBLA 183 (Oct. 30, 1986)

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110. In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," a dictionary definition of "established" may be applied.

The Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 246 (Feb. 22, 1989)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERFORMANCE BOND OR DEPOSIT

Generally

Where the record is unclear whether the surety of a performance bond was served by certified mail with OSMRE's notice of determination to forfeit the bond and the surety on appeal expresses its intention to reclaim the permit area, OSMRE should properly re-serve its notice of determination in accordance with 30 CFR 800.50.

American Resources Insurance Co., Inc., 99 IBLA 242 (Oct. 20, 1987)

The Office of Surface Mining Reclamation and Enforcement properly issued a Notice of Violation for failure to comply with 30 CFR 942.800(b)(3) where an operator did not post an acceptable new bond within 30 days of the effective date of the Federal program in Tennessee.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 24 (Aug. 19, 1988)

Where a notice of violation has properly been issued citing an operator for failure to post an acceptable performance bond, and no acceptable bond is tendered within the maximum 90-day abatement period allowed to be afforded to the permittee to abate the violation pursuant to 30 CFR 843.12(c), OSMRE properly issues a cessation order for failure to abate a violation.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 153 (Dec. 7, 1989)

Forfeiture

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERFORMANCE BOND OR DEPOSIT--Continued

Forfeiture--Continued

30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

PERMANENT REGULATORY PROGRAM

Generally

Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

PERMITS

Generally

An authorized representative of the Secretary properly issues a cessation order under 30 CFR 843.11(a)(2) where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

Oklahoma Permanent Regulatory Program Regulations 779.25(j), which requires a surface mining operator to submit, in its permit application, cross-section maps and plans showing the location and depth, if available, of oil and gas wells within the proposed permit area,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Generally--Continued

is not satisfied by the submission of an aerial photograph which does not designate or clearly show the existence of wells within the proposed permit area.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 349 (Nov. 3, 1987)

Where a mining permit requires a 25-foot-wide buffer zone between a natural drainage channel and the mining activity, testimony by an OSMRE inspector that a mine pit had been constructed within 5 to 10 feet of that channel and that the pit wall had slumped into the pit thereby diverting drainage in the channel into the pit will support a finding of violation and the assessment of an appropriate civil penalty.

A notice of violation issued to a company for mining without a permit will be sustained and an appropriate civil penalty assessed where the record shows that the road providing access to the company's permitted minesite also provided the only access to an unpermitted minesite; that access to the road was controlled by a locked gate to which the company had a key; that the company's sign was located at the gate; that the gate was kept locked to protect the company's equipment; and that one of the principals of the company owned the surface of the lands in question.

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

Where an Administrative Law Judge upholds a notice of violation issued on the basis that discharges from a permittee's sedimentation ponds had reaffected downslope areas outside the permit area by causing erosion, but the evidence submitted at a hearing on the notice of violation establishes that a previous mine operators had placed spoil on the downslope; that they had abandoned the minesite without stabilizing or reclaiming the downslope area; that the permittee did not commence its operations until many months after abandonment; and there is testimony that there were

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Generally--Continued

no discharges from those ponds, the Administrative Law Judge's decision will be reversed.

H&B Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 286 (Aug. 3, 1988)

Because conducting surface mining operations without a surface mining permit is specifically defined at 30 CFR 843.11(a)(2) to constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm, OSMRE may issue a cessation order solely on the grounds that surface mining operations are being conducted under a notice of intent to prospect.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988)  
 95 I.D. 293

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of all sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Generally--Continued

resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

Application

"All anticipated mining." In the absence of either a statutory or regulatory definition of "all anticipated mining," OSM's 1981 interpretation of that phrase in secs. 507(b)(11) and 510(b)(3), 30 U.S.C. § 1257(b)(11) and 30 U.S.C. § 1260(b)(3) (1982), to include all future mining for which a permit application had been filed, as well as all present mining, was a reasonable construction. Subsequent to OSM's interpretation, this term was defined at 30 CFR 701.5 under the heading "cumulative impact area" to include, in addition to the above, all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

Description of ground water basins or systems is an informational requirement which must be fulfilled by the coal mining permit applicant as part of its responsibility to provide sufficient data so the regulatory authority may make its probable cumulative impact assessment.

There is no merit to an argument by one challenging the 1981 issuance of a permit to mine coal that certain areas should have been included in OSM's probable cumulative impact assessment as a control watershed in the absence of a regulatory requirement for such information.

Neither sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), nor applicable regulations require OSM to set forth the baseline data used in making its assessment

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Application--Continued

of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. The applicant for a permit has the duty to describe baseline data.

Neither sec. 507(b)(11), 30 U.S.C. § 1257(b)(11) (1982), nor applicable regulations require OSM to develop information for use in its assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance. OSM's obligation is to provide only that information which is available from appropriate governmental agencies. If such information is not available, the permit applicant must gather the necessary information and submit it with the application.

An assessment of the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance does not satisfy sec. 510(b)(3), 30 U.S.C. § 1260(b)(3) (1982), where the regulatory authority fails to set forth reasons for its finding that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. An assessment pursuant to sec. 510(b)(3) of the Act must include, *inter alia*, a discussion by the regulatory authority of ground water.

A 1979 environmental impact statement describing both site-specific and aggregate effects of coal mining does not require supplementation in the absence of significant change in the proposed operation.

Sec. 510(b)(1), 30 U.S.C. § 1260(b)(1) (1982), requires that no permit shall be approved unless there has been compliance with all the requirements of the Act and the State or Federal program. Where a regulatory requirement is unsatisfied at the time of permit issuance and the regulatory authority seeks to satisfy that requirement by the imposition of a stipulation to the permit, sec. 510(b)(1) of the Act has been violated.

In response to the decision by Judge Thomas Flannery in *In re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. Feb. 26, 1980),



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Application--Continued

suspending the term "mine plan area" in the regulations, the Department amended its regulations to limit the area for which a determination of the probable hydrologic consequences must be made by the applicant. This determination is restricted by regulation 30 CFR 784.14(e)(1) (1983) to the proposed permit and adjacent areas. (1) (1983) to the proposed permit and adjacent areas. This regulation was subsequently remanded to the Department by Judge Flannery in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. July 15, 1985).

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 1 (Sept. 27, 1985) 92 I.D. 389

Where OSM has not acted in an arbitrary and capricious fashion, a decision under 30 CFR 764.15(a)(7) not to consider an unsuitability petition filed pursuant to sec. 522(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(c) (1982), to the extent it involves land which is subject to a Federal Coal Mining and Reclamation permit application which was filed, and the first newspaper notice thereof published, prior to the filing of the petition, will be affirmed.

Donald B. Peterson, 97 IBLA 314 (May 19, 1987)

Approval

A determination by OSM in the issuance of a permit to conduct underground coal mining operations to allow 50-percent extraction of coal under a landslide area

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Approval--Continued

will be upheld where one challenging such a determination fails to present any persuasive evidence that it was error.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 1 (Sept. 27, 1985) 92 I.D. 389

The Board of Land Appeals is not bound by the permitting scheme established by Congress in fashioning relief in an administrative review proceeding in which issuance of a permit to mine has been challenged, where the party seeking review has actively waived or acquiesced to a waiver of the review deadlines in 30 U.S.C. § 1264(c) (1982).

Under 30 U.S.C. § 1260(b)(3) (1982), in reviewing a permit or permit revision application the regulatory authority is required to assess the probable cumulative impact of all anticipated mining on the hydrologic balance. Where the state has the primary responsibility under a cooperative agreement for purposes of providing notice and opportunity for a hearing on the review and approval of a permit or permit revision application, it prepares the probable cumulative impact assessment and solicits public comment.

Where the Board of Land Appeals finds on the basis of a petition for review of the approval by OSM of a 1981 permit to mine that OSM failed to prepare a proper probable cumulative impact assessment before issuing the permit, no relief is appropriate where, under a cooperative agreement entered into after the issuance of the permit, the permittee seeks two revisions of its permit for which the state prepares new probable cumulative impact assessments, invites comment thereon, and the petitioners fail to register any objections. OSM's failure will be considered to have been cured

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Approval--Continued

when no objection to the new assessments prepared by the state was raised by petitioners.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)  
 93 I.D. 417

The regulations at 43 CFR 4.1360-4.1369 govern proceedings on review of approval or disapproval of applications for new surface mining permits on Federal lands and Indian lands. Any order or decision of an Administrative Law Judge disposing of a permit review proceeding is subject to review only pursuant to a petition for discretionary review filed with the Board within 30 days of receipt of the decision under the regulation at 43 CFR 4.1369(a).

The Hopi Tribe v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 329 (Mar. 10, 1989)

Under 30 CFR 773.15(b) (1987), the regulatory authority shall, prior to approval of a permit for a surface mining and reclamation operation, make a finding that any operation owned or controlled by the applicant is not currently in violation of any Federal law, rule, or regulation, or any state law, rule, or regulation pertaining to air or water environmental protection.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

Where at the time of permit approval under a Federal lands program in a state without a cooperative agreement, OSMRE conditions permit approval on a state regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Approval--Continued

Surface Mining Control and Reclamation Act of 1977, and, therefore, unenforceable under state law.

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with state regulatory provisions that are part of a state program necessitates that, to the extent those state standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the state regulations are controlling.

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of 11 sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

Old Ben Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 362 (June 23, 1989)

Approval of a permit application by a state regulatory authority is not litigation that would preclude subsequent issuance of a notice of violation by OSMRE under the doctrine of collateral estoppel.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

Hearings

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Hearings--Continued

of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely, filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

Peabody Coal Co. (Appellant) v. The Hopi Tribe & Office of Surface Mining Reclamation & Enforcement (Appellees), 91 IBLA 59 (Feb. 28, 1986)

Where the pleadings reveal that no material issue of fact is in dispute, no hearing is required to be held by the Administrative Law Judge, notwithstanding the terms of 30 U.S.C. § 1275 (1982), to a providing an opportunity for a public hearing or a permittee seeking review of a cessation order or notice of violation.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

An individual who submits proof of residing within three-fourths of a mile of a coal preparation plant, and shows that he may be adversely affected by traffic and air pollution caused by coal trucks transporting coal to the plant has standing within the meaning of a 30 CFR 700.5 to seek review of OSMRE's approval of a permit to operate the plant.

Frank Stebly v. Office of Surface Mining Reclamation & Enforcement, 109 IBLA 242 (June 16, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Modifications

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to potential liability under the Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Where the evidence demonstrates that reclamation has not occurred as set forth in the currently approved permit, a notice of violation issued for this failure will be upheld.

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

In enforcing SMCRA and the regulations promulgated pursuant thereto, OSMRE is entitled to rely upon the permit package for terms and conditions under which mining and reclamation have been approved. An operator must obtain a variance or amendment of the permit before engaging in conduct that would otherwise violate the terms of the permit and/or the regulations.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 327 (Mar. 21, 1988)

Reclamation Plan

Where one files a permit application package to mine coal on Federal lands in a state in which the state and the Secretary of the Interior have entered into a cooperative agreement in accordance with 30 U.S.C. § 1273(c) (1982), the state is responsible for approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application. A cooperative agreement does not vest



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Reclamation Plan--Continued

the state with complete control over mining on Federal lands.

Natural Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), West Elk Coal Co. (Intervenor), State of Colorado (Intervenor), 94 IBLA 269 (Nov. 18, 1986)  
93 I.D. 417

Where the evidence demonstrates that reclamation has not occurred as set forth in the currently approved permit, a notice of violation issued for this failure will be upheld.

Rith Energy, Inc., 101 IBLA 190 (Feb. 17, 1988)

Revisions

In enforcing SMCRA and the regulations promulgated pursuant thereto, OSMRE is entitled to rely upon the permit package for terms and conditions under which mining and reclamation have been approved. An operator must obtain a variance or amendment of the permit before engaging in conduct that would otherwise violate the terms of the permit and/or the regulations.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 327 (Mar. 21, 1988)

OSMRE properly denies an application for permit revision when the applicant does not provide sufficient operational data to demonstrate that reclamation, as required by SMCRA and the Tennessee Federal program, can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Under 30 U.S.C. § 1265(b)(10)(A) (1982), and 30 CFR 816.41(f), OSMRE is required to avoid acid

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Revisions--Continued

or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 239 (Oct. 24, 1989)

Temporary Relief

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

Under regulation 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1), when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PERMITS--Continued

Transfer, Assignment, or Sale of Rights

Under sec. 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1982), a permittee of a mine site is a proper party to be cited for a violation of the Act notwithstanding the fact the coal was removed by a third party. Pursuant to sec. 511(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1261(b) (1982), a permittee may not transfer, assign, or sell rights granted under any permit without the written approval of the regulatory authority. Hence, a purported assignment of the permittee's rights under the permit to a third party will not suffice to relieve the permittee of liability for violations of the Act in the absence of an approved assignment.

Clark Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 93 (Apr. 15, 1988)

POSTMINING LAND USE

Generally

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 84 (Feb. 2, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

POSTMINING LAND USE--Continued

Generally--Continued

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

PREVIOUSLY MINED LANDS

Generally

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

Allegations that contamination of the water discharged from a sediment pond constructed pursuant to a surface mining permit to collect waters from the disturbed area was from other than the disturbed area are of no benefit to appellant without a showing that the other area was the sole source of the contamination. Water quality limitations apply to all discharges flowing from a disturbed area into a sedimentation pond constructed to achieve compliance with SMCRA.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PRIME FARMLANDS

Generally

Where surface mining permits are granted under a State-approved program for areas that include "prime farmland" and the permittee classifies the post-mining use of all the permit area as "pastureland," in light of the fact the Surface Mining Control and Reclamation Act of 1977 and Federal regulations implementing the Act in 30 CFR Part 715 along with State regulations under the State program require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area, OSM may properly issue NOV's after the State has failed to act in response to 10-day notices to require the permittee to provide crop-yield data showing compliance with cited State and Federal regulations.

Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

PROHIBITION OF MINING OPERATIONS

Generally

Regulation 30 CFR 942.764(c) is properly construed to mean that final unsuitability designations made under the Tennessee State program shall remain valid unless and until terminated.

Frozen Head State Park Ass'n, et al., 102 IBLA 32 (Apr. 7, 1988)

"Surface coal mining operations." The stockpiling of coal from an underground mine will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1982), where the evidence establishes that such stockpiling was incident to the surface operations of the mine.

A coal stockpiling operation which was conducted on two occasions, first in 1974 and again in 1980, was not "in existence" on Aug. 3, 1977, so as to be excepted from the prohibition against conducting surface coal mining operations within 100 feet of a

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
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PROHIBITION OF MINING OPERATIONS--Continued

Generally--Continued

public road embodied in sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982).

In West Virginia, to have valid existing rights in 1980 to stockpile coal within 100 feet of a road, in violation of sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982), a person must demonstrate property rights in existence on Aug. 3, 1977, that were created by a legally binding document authorizing the applicant to produce coal by surface coal mining operations, and a good faith effort to obtain all permits required to conduct such operations, or that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

Valley Camp Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 19 (Nov. 16, 1989) 96 I.D. 455

PUBLIC HEALTH AND SAFETY

Generally

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (June 26, 1986)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PUBLIC HEALTH AND SAFETY--Continued

Imminent\_Danger

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

If, upon reinspection after a State has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

PUBLIC HEALTH AND SAFETY--Continued

Imminent\_Danger--Continued

operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

Hazel King, 96 IBLA 216 (Mar. 20, 1987) 94 I.D. 89

RECLAMATION FEES

Liability

"Operator." Identification of the "operator" responsible for payment of reclamation fees under sec. 402(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a literal interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes the coal is responsible for payment of the reclamation fees.

When an operator has made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and when that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which conforms with the requirements of 31 U.S.C. § 3716 (1982).

McWane Coal Co., Inc., 95 IBLA 1 (Dec. 11, 1986) 93 I.D. 460

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

RECLAMATION FEES--Continued

Liability--Continued

Under the enforcement scheme of the Act and regulations, a variety of procedures is available to OSMRE to collect delinquent reclamation fees from coal operators. These procedures include, among others, the institution of an action at law in a court of competent jurisdiction and, where appropriate, the issuance of notices of violation and cessation orders to compel payment of the debt.

Black Hawk Coal Co. & Gary Yeanev v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 248 (Dec. 28, 1989)

REVEGETATION

Generally

Failure to revegetate surface mining sites in conformity to state and Federal regulations was not shown by use of random sampling method, the origin and application of which were not explained, where miner's proof established there was a complete revegetation of surface mining sites in conformity to regulation in force.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

OSMRE may properly issue a notice of violation to the permittee of a surface coal mining operation in the reclamation phase under an interim program permit when it finds cattle grazing thereon in violation of 30 CFR 715.20(e)(2). The permittee's diligent efforts to keep cattle from entering the area are factors to be considered in mitigation of the amount of a civil penalty assessed under 30 CFR Part 723.

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to seven points, based upon the extent of potential or actual damage resulting from the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

REVEGETATION--Continued

Generally--Continued

violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(2)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR 723.13(b)(2)(i), and the duration and extent of the resulting damage was limited under 30 CFR 723.13(b)(2)(ii).

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 56 (June 8, 1987)

A failure to comply with 30 CFR 715.20(a)(1) (requiring establishment of a diverse, effective, and permanent vegetative cover on disturbed lands) will not be excused on the ground that the permittee took adequate steps to comply and would have achieved compliance but for drought conditions beyond his control, where the permittee did not show at the hearing that it would have achieved compliance but for the drought, where the record shows that previous efforts to reseed had been inadequate, and where the OSMRE inspector testifies that reseeding may have failed because of poor, acidic soil conditions at the site.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

When OSMRE issues a notice of violation for live-stock grazing under 30 CFR 715.20(e)(2), OSMRE shall assign up to 15 points, based upon the probability of revegetation failure and erosion, under 30 CFR 723.13(b)(2)(i), and up to 7 points, based upon the extent of potential or actual damage resulting from the violation, if the damage is confined to the permit area, under 30 CFR 723.13(b)(ii). This Board will reduce the number of points assigned for a violation of 30 CFR 715.20(e)(2) when the record discloses that the probability of revegetation failure and erosion was insignificant, rather than likely under 30 CFR



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

REVEGETATION--Continued

Generally--Continued

723.13(b)(2)(i), and where other mitigating factors were shown.

Lone Star Steel Co. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 134 (Feb. 6, 1989)

ROADS

Generally

A road used for hauling coal or as access to a mine must be included in a permit unless an operator shows that: (1) the road has been duly established as a public road according to the laws of the jurisdiction in which it is located; (2) there is substantial (more than incidental) public use of the road; and (3) the road is actually maintained with public funds in a manner similar to other public roads in the vicinity. The decision of the Administrative Law Judge vacating notices of violation issued to an operator for utilizing roads not properly permitted will be affirmed where the record contains evidence to support his conclusions that the roads are public roads within the meaning of the regulation.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 369 (June 28, 1985)

Under the approved Virginia permanent regulatory program a road used for coal hauling or access to a surface coal mining operation must be included in permit acreage calculations unless (1) the road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (2) the road is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ROADS--Continued

Generally--Continued

located; and (3) there is substantial (more than incidental) public use of the road.

Rapaco Energy Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 195 (Oct. 17, 1985)

The construction of a private way for the sole purpose of moving a dragline from a site at which it had been used for surface mining to another site where it would again be used for surface mining is construction incidental to surface mining, and is therefore a surface mining activity which requires a permit under SMCRA.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ROADS--Continued

Generally--Continued

sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

Construction

The construction of a private way for the sole purpose of moving a dragline from a site at which it had been used for surface mining to another site where it would again be used for surface mining is construction incidental to surface mining, and is therefore a surface mining activity which requires a permit under SMCRA.

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

Maintenance

When a public road, receiving more than incidental public use, is utilized as a coal haul and access road, it will be subject to regulation and permitting under the Surface Mining Control and Reclamation Act of 1977 where the county allocates monies for road maintenance but the only expenditure by the county in 5 years for the road in question was made at the behest of the coal operator in an attempt to avoid Federal regulation.

Rapaco Energy Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 195 (Oct. 17, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

ROADS--Continued

Maintenance--Continued

OSMRE properly issues a notice of violation for failure to maintain an access road so as to prevent additional contributions of suspended solids to streamflow where the evidence establishes that water used to control dust on the permittee's access road was carrying suspended solids in access of the allowable limit set by 30 CFR 717.17(a)(3) off the permit area and into the river.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988)  
95 I.D. 181

SPOIL AND MINE WASTES

Generally

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that the operations had an adverse physical impact on the lands.

Pineville Properties Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 258 (Sept. 13, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM

Generally

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254 (1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized but obligated to issue a cessation order for this failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 1271(b) of SMCRA.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 194 (Aug. 15, 1986)

Where surface mining permits are granted under a State-approved program for areas that include "prime farmland" and the permittee classifies the post-mining use of all the permit area as "pastureland," in light of the fact the Surface Mining Control and Reclamation Act of 1977 and Federal regulations implementing the Act in 30 CFR Part 715 along with State regulations under the State program require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area, OSM may properly issue NOV's after the State has failed to act in response to 10-day notices to require the permittee to provide crop-yield

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

data showing compliance with cited State and Federal regulations.

The Secretary of the Interior through OSM properly has jurisdiction to issue notices of violation in states with approved programs, where OSM acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSM issues a 10-day notice and the State fails to take action to ensure abatement of the violations.

Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (Aug. 22, 1986)

OSMRE has jurisdiction to issue a notice of violation of a State permanent regulatory program where OSMRE has assumed direct Federal enforcement of the State program pursuant to public notice duly published in the Federal Register.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of SMCRA.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 349 (Nov. 3, 1987)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 365 (Jan. 12, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 299 (May 31, 1988)  
 95 I.D. 75

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 323 (June 3, 1988)

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 307 (Mar. 2, 1989)

The Secretary of the Interior through OSMRE has jurisdiction to issue a notice of violation in states with approved programs, where OSMRE, acting pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12(a)(2), issues a 10-day notice and the State fails to take appropriate action to ensure abatement of the violation or show good cause for its failure.

Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (Dec. 23, 1987)

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State, regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 84 (Feb. 2, 1988)

The Federal Register notice (49 FR 14674 (Apr. 12, 1984)) of the Secretary's decision to initiate Federal enforcement of the approved Oklahoma regulatory program effective Apr. 30, 1984, was in compliance with sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), which notice provision supersedes the more general

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

rulemaking requirements of the Administrative Procedure Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 327 (Mar. 21, 1988)

The administrative procedures established by 30 U.S.C. § 1271(b) (1982), of the Surface Mining Control and Reclamation Act of 1977 override those established by the Administrative Procedure Act, and, therefore, no violation of 5 U.S.C. § 553(d) (1982), occurred when the Office of Surface Mining Reclamation and Enforcement did not provide notice 30 days prior to taking over the Oklahoma enforcement program.

Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111 (Apr. 20, 1988)

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1271(b) (1982).

A person conducting surface coal mining operations in Oklahoma under a permit issued during the initial regulatory period may continue to conduct operations under that permit beyond the date required for obtaining a permit issued pursuant to the Oklahoma permanent regulatory program if, inter alia, the operations are conducted in compliance with the Department's initial program regulations. This exception is consistent with Citizens for the Preservation of Knox County, 81 IBLA 209 (1984), in which the Board ruled that when surface coal mining operations are completed prior to approval of a state program, the remaining reclamation operations may be completed under the initial program regulations.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 10 (June 22, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

OSMRE may properly find that a state has not taken appropriate action to correct a violation where the state has granted an extended abatement period to a permittee without requiring the permittee, contrary to state regulations, to document the basis for its extension request, and, following a 10-day notice, has taken no remedial action. Upon such a finding, OSMRE shall inspect the permittee's operation and, if the underlying violation continues, issue a notice of violation.

Collins Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 25 (June 22, 1988)

OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity, and thus a permit is not required, the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

A state with an approved program is responsible for carrying out the provisions of SMCRA. This charge will obviously be unfulfilled if OSMRE allows the state to maintain a position contrary to that Act. When the State has clearly demonstrated that it does not intend to enforce its program, and the course of action adopted by the state renders it impossible for an operator to legally undertake operations which would otherwise be permitted, OSMRE is required to institute

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

Generally--Continued

proceedings pursuant to the provisions of 30 U.S.C. § 1271(b) (1982).

Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, Pennsylvania Coal Mining Ass'n, et al. (Amici Curiae), 108 IBLA 303 (Apr. 28, 1989)

The Federal Register notice (49 FR 14674 (Apr. 12, 1984)) of the Secretary's decision to initiate Federal enforcement of the approved Oklahoma regulatory program effective Apr. 30, 1984, was in compliance with sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), which notice provision supersedes the more general rulemaking requirements of the Administrative Procedure Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 166 (Dec. 11, 1989)

10-day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

10-day\_Notice to\_State--Continued

do so by presenting evidence which establishes the violation.

Turner Brothers, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 92 IBLA 23 (May 8, 1986)  
 93 I.D. 199

Pursuant to provision of 30 U.S.C. § 1276(a)(1) (1982) an attack upon the validity of the Secretary's regulations published pursuant to the Surface Mining Control and Reclamation Act of 1977 may be heard only in the United States District Court for the District of Columbia. An attack upon the validity of 30 CFR 843.12(a)(2) may not, as a consequence, be entertained by the Interior Board of Land Appeals.

Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., Inc., & Battle Creek Mining Co., Inc., 95 IBLA 182 (Jan. 13, 1987)

Where a 10-day notice to the State regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204 (Jan. 14, 1987)  
 94 I.D. 12

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

10-day\_Notice to\_State--Continued

When the Office of Surface Mining Reclamation and Enforcement issues a 10-day notice to a state pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), based upon a citizen's complaint which alleges irregularities in the issuance of surface mining permits, and the state responds by demonstrating that the operator and the state complied with relevant provisions of the state's surface mining statute, the Board will affirm the decision of the Acting Director, Office of Surface Mining Reclamation and Enforcement, that the response to the citizen's complaint was appropriate.

Samuel M. Mullinax, 96 IBLA 52 (Feb. 27, 1987)

Where a 10-day notice to the State regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the State fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the State action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87 (Sept. 15, 1987)

"Good cause for such failure." As used in 30 CFR 843.12(b), the term "good cause for such failure" of a state regulatory authority to take appropriate action after the receipt of a 10-day notice does not include the legal inability of the agency to act, but rather is limited to a showing either that no violation existed or that the operation was not subject to the provisions of the Surface Mining Control and Reclamation Act of 1977.

As used in 30 CFR 843.12(b), the term "state program" must be interpreted as including within its ambit so much of the initial Federal performance standards as continued to apply to mining operations



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

within the State after the approval of the State permanent program.

Where an operator has actual knowledge that religious services are being conducted in a building, the operator will not be heard to argue that the building was not a "church" within the meaning of 30 CFR 715.19(e)(2)(ii)(B)(1).

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 167 (Feb. 17, 1988)

When OSMRE issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging damage to a dwelling caused by blasting operations, this Board will set aside OSMRE's decision affirming the finding of the state regulatory authority that blasting operations did not cause the property damage and refer the case for a hearing before an Administrative Law Judge pursuant to 43 CFR 4.1286 where there are material issues of fact as to whether the blasting operations were a causative factor in the damage.

Mr. & Mrs. William J. Hamilton, 105 IBLA 160 (Oct. 28, 1988)

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned mine site and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

The Secretary of the Interior through OSMRE may issue notices of violation in states with approved programs, where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) and, after OSMRE issues a 10-day notice, the state fails to take action to ensure abatement of the violation.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

STATE REGULATION

Generally

As of Apr. 30, 1984, officials of OSM were authorized, pursuant to sec. 504 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1254 (1982), to directly enforce the inspection and enforcement provisions of the approved State of Tennessee permanent regulatory program. 49 FR 15496 (Apr. 18, 1984). Notwithstanding that the State subsequently repealed its surface mining law and implementing regulations effective Oct. 1, 1984, it was proper for OSM under its enforcement authority to issue a notice of violation prior thereto for a recognized violation of the State program. When abatement of the violation did not occur within the period of time prescribed in the notice of violation, OSM was not only authorized but obligated to issue a cessation order for this



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE REGULATION--Continued

Generally--Continued

failure. The cessation order was not invalid because it was issued after Oct. 1, 1984.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to potential liability under the Act.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 381 (July 14, 1986)

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE REGULATION--Continued

Generally--Continued

evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

Bernos Coal Co. & Excello Land & Mineral Corp. v. Office of Surface Mining Reclamation & Enforcement, 97 IBLA 285 (May 18, 1987)  
94 I.D. 181

An extension of time in which to reclaim a mine-site granted by the State does not excuse noncompliance with the initial Federal performance standards relating to reclamation.

Alabama By-Products Corp. & Drummond Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 264 (Aug. 1, 1988)

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSMRE may issue a notice of violation in accordance with 30 CFR 843.12(a), if the state fails to take "appropriate action" to abate the violation. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

Harman Mining Corp. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 98 (Aug. 3, 1989)

One of the principles of res judicata and collateral estoppel is that the question expressly and definitely presented in the current litigation must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation. Accordingly, the doctrines of res judicata and collateral estoppel cannot preclude OSMRE from issuing a notice of violation, enforcing a cessation order, or assessing penalties therefor if the previous violation cited by the State differs from the violation

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

STATE REGULATION--Continued

Generally--Continued

cited by OSMRE and the violation cited by OSMRE was not adjudicated before the state agency.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

30 CFR 715.14(e) is an initial program regulation that requires that all highwalls in a permanent impoundment be eliminated by grading to appropriate contour. Compliance with a state permit allowing an underwater highwall does not excuse failure to comply with this regulation.

Approval of a permit application by a state regulatory authority is not litigation that would preclude subsequent issuance of a notice of violation by OSMRE under the doctrine of collateral estoppel.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

TEMPORARY RELIEF

Generally

Pursuant to sec. 525(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(c) (1982), an applicant for temporary relief from a cessation order or a notice of violation must show "that there is substantial likelihood that the findings of the Secretary will be favorable to him" and that "such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

TEMPORARY RELIEF--Continued

Evidence

A party seeking temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement must show a substantial likelihood that the findings of the Secretary in the matter to which the application relates will be favorable to the applicant.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

Temporary relief cannot be granted where no evidence has been presented that one of the essential conditions has been met for obtaining such relief.

B&J Excavating Co. v. Office of Surface Mining Reclamation & Enforcement, 89 IBLA 129 (Sept. 30, 1985)

Significant, Imminent Environmental Harm

Where a state has acquired primacy over the regulation of surface mining operations within the state, the Office of Surface Mining Reclamation and Enforcement is required to conduct an immediate Federal inspection on the basis of a citizen's complaint under 30 CFR 842.11(b)(1) only if the person requesting the inspection provides adequate proof that an imminent danger exists and that the state regulatory authority has failed to take appropriate action.

Where a person requesting a Federal inspection pursuant to 30 CFR 842.11(b)(1) is required to furnish adequate proof that an imminent danger exists, he does not have an obligation to provide proof that an operation affects more than 2 acres, because the burden of proving an exemption from the Act rests upon the party asserting the exemption.

A State regulatory authority has failed to take appropriate action against a surface coal mining operator creating an imminent danger when it has been

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

TEMPORARY RELIEF--Continued

Significant, Imminent Environmental Harm--Continued  
enjoined by a State court from taking enforcement action determined necessary to secure abatement of the violation.

Departmental regulation 30 CFR 842.11(b)(1) does not authorize OSM to postpone an inspection required by that provision until it conducts a reclamation fee compliance audit of the alleged violators.

Thomas J. Fitzgerald, 88 IBLA 24 (July 5, 1985)

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (Apr. 30, 1986)

Under regulation 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(1), when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (Feb. 8, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

TIPPLES AND PROCESSING PLANTS

At or Near a Minesite

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985)  
92 I.D. 383

In Connection With

Offsite processing facilities are operated "in connection with" surface mines where the owner and operator of the facility is also the permittee and/or operator of a group of supplying mines.

Race Fork Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 84 IBLA 383 (Jan. 28, 1985)  
92 I.D. 68

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985)  
92 I.D. 383



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
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TOPSOIL

Generally

When, in response to a 10-day notice, the state permanent regulatory authority informs OSMRE that it has issued two cessation orders for nonconcurrent reclamation of an abandoned minesite and is pursuing bond forfeiture, OSMRE may find such response to be appropriate within the meaning of sec. 521(a) of SMCR, 30 U.S.C. § 1271(a) (1982). Upon such finding, no Federal inspection need ensue.

Mario L. Marcon, 109 IBLA 213 (June 12, 1989)

Redistribution

Where a fair interpretation of the terms of an approved permit leads to the conclusion that the operator agreed that approximately 24 inches of topsoil were present on the area which would be disturbed, an operator will not be heard to argue after the completion of mining, when it is no longer possible to ascertain with certainty how much topsoil had originally existed, that substantially less than 24 inches were found to exist during the course of its surface mining operations.

Office of Surface Mining Reclamation & Enforcement v. P & K Co., Ltd., 99 IBLA 257 (Oct. 20, 1987)

Where OSMRE has assumed direct Federal enforcement of a state program, it properly declines to take enforcement action in response to a citizen's complaint where the complainant fails to establish any violation of the state equivalent of the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (1982), or its implementing regulations as a result of the mine operator's construction of a permanent water impoundment and drainage channel, removal and placement of topsoil within the permitted area, and filling in of an open pit on adjacent non-permitted land.

Willie N. Cook, 107 IBLA 278 (Feb. 23, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
 --Continued

VALID EXISTING RIGHTS

Generally

Under the facts of this case, OSMRE properly applied the definition set forth in the permanent regulatory program approved for the Commonwealth of Virginia in determining whether applicants had valid existing rights to surface mine coal on lands located within a national forest.

An applicant for valid existing rights bears the burden of proving entitlement.

Blackmore Co., Hagan Estates, Inc., 108 IBLA 1 (Mar. 20 1989)

Under the provisions of the regulation at 30 CFR 740.11(a)(3) the definition of valid existing rights found in the approved Kentucky State regulatory program is properly applied by OSMRE officials to adjudicate an application for valid existing rights to mine reserved coal deposits on Federal lands within the Daniel Boone National Forest. A decision rejecting such an application will be affirmed where the applicant has acknowledged not having applied for the necessary permits to mine the coal as of the Aug. 3, 1977, enactment of the Surface Mining Control and Reclamation Act of 1977.

The Stearns Co., 110 IBLA 345 (Sept. 14, 1989)

A coal stockpiling operation which was conducted on two occasions, first in 1974 and again in 1980, was not "in existence" on Aug. 3, 1977, so as to be excepted from the prohibition against conducting surface coal mining operations within 100 feet of a public road embodied in sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982).

In West Virginia, to have valid existing rights in 1980 to stockpile coal within 100 feet of a road, in violation of sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982), a person must demonstrate property rights in existence on Aug. 3, 1977, that were created by a legally binding document authorizing the applicant to produce coal by surface coal mining operations, and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VALID EXISTING RIGHTS--Continued

Generally--Continued

a good faith effort to obtain all permits required to conduct such operations, or that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

An applicant for valid existing rights bears the burden of proving entitlement.

Valley Camp Coal Co. v. Office of Surface Mining  
Reclamation & Enforcement, 112 IBLA 19 (Nov. 16, 1989)  
96 I.D. 455

VARIANCES AND EXEMPTIONS

Generally

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly issue a notice of violation requiring remedial action of a reclamation nature.

Clinchfield Coal Co. v. Office of Surface Mining  
Reclamation & Enforcement, 95 IBLA 360 (Feb. 18, 1987)

In order to qualify for an exemption under the terms of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A), the extraction of coal must be both incidental to the extraction of other minerals and constitute less than

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VARIANCES AND EXEMPTIONS--Continued

Generally--Continued

16-2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale.

"Incidental." The extraction of coal is not incidental to the extraction of other minerals where the mining of coal is essential to the economic viability of the mine; the coal is the deepest strata mined for commercial use or sale; the acreage of the shallower deposits extracted for commercial use or sale is less than 50 percent of the acreage of the coal deposit extracted; the acreage of the mineral deposit immediately above the coal seam extracted is less than 5 percent of the acreage of coal extracted; and the decision to mine the deposit immediately above the coal is based on the decision to mine the coal.

McNabb Coal Co., Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 101 IBLA 282 (Mar. 15, 1988)

In enforcing SMCRA and the regulations promulgated pursuant thereto, OSMRE is entitled to rely upon the permit package for terms and conditions under which mining and reclamation have been approved. An operator must obtain a variance or amendment of the permit before engaging in conduct that would otherwise violate the terms of the permit and/or the regulations.

Turner Brothers, Inc. v. Office of Surface Mining  
Reclamation & Enforcement, 101 IBLA 327 (Mar. 21, 1988)

Under 30 U.S.C. § 1291(28), the extraction of coal which is incidental to the extraction of other minerals where coal does not exceed 16-2/3 percent of the mineral tonnage removed for commercial use or sale is exempt from the requirements of the Surface Mining Control and Reclamation Act of 1977. The burden of alleging facts and establishing entitlement to this exemption is upon the person claiming it.

Cumberland Reclamation Co., 102 IBLA 100 (Apr. 18, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VARIANCES AND EXEMPTIONS--Continued

Generally--Continued

To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982), extraction of coal must be incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it.

JDG, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 210 (Feb. 16, 1989)

2-Acre

Sec. 528(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply to mining operations which affect 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." Where 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above ground disturbance, the total affected area is 2.17 acres and appellant's mining operation is within the jurisdiction of the Act.

S & S Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 87 IBLA 350 (June 27, 1985)

While, in general, under the Surface Mining Control and Reclamation Act of 1977 surface coal mining operations may not be conducted without first obtaining a permit from either a state agency or OSM, the Act does not apply to the extraction of coal for commercial purposes when the surface mining operation affects 2 acres or less.

A party contesting OSM's jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based, and it must not only come

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VARIANCES AND EXEMPTIONS--Continued

2-Acre--Continued

forward with supporting evidence but also must carry the ultimate burden of persuasion if OSM attempts to rebut the evidence.

Under 30 CFR 700.11(b), where an entity that is extracting coal intends to affect more than 2 acres, that entity is not exempted from coverage under the Surface Mining Control and Reclamation Act of 1977 regardless of whether or not it has actually affected 2 acres.

Office of Surface Mining Reclamation & Enforcement v. C-Ann Coal Co., 94 IBLA 14 (Sept. 19, 1986)

Until its repeal by Congress, the 2-acre rule exempted small operators who could show that their operations, together with related operations, affected less than 2 acres. The burden of showing entitlement thereto was on the operator claiming the exemption.

Cumberland Reclamation Co., 102 IBLA 100 (Apr. 18, 1988)

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 106 IBLA 179 (Dec. 20, 1988)  
95 I.D. 293

Where a portion of a county road used as a haul road for a surface coal mining operation is not excepted from the "affected area" under 30 CFR 701.5 (1986), and, when added to the area which the operator admits is affected by its operations, causes such operations to affect more than 2 acres, the operations will not be considered exempt from compliance with the requirement to eliminate all highwalls set forth in



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

VARIANCES AND EXEMPTIONS--Continued

2-Acre--Continued

sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(3) (1982).

Cherry Hill Development v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 185 (Aug. 17, 1989)

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Generally

No violation of the Surface Mining Control and Reclamation Act of 1977 occurred where, during the interim program for the regulation of surface coal mining in Pennsylvania, surface drainage was passed from one permit area to an adjacent permit and then passed through a sedimentation pond before leaving the second permit area, where both permit areas were within the same mine drainage permit issued by the state regulatory authority.

Thompson Brothers Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 69 (Oct. 18, 1988)

Where OSMRE presents uncontroverted evidence showing essential facts establishing a reasonable likelihood that a blockage of a diversion ditch would allow runoff outside the permit area, an NOV issued by OSMRE citing a violation of 30 CFR 715.17(c)(3) will be upheld.

Coal Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 105 IBLA 385 (Nov. 29, 1988)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS--Continued

Acid and Toxic Materials

OSMRE properly denies an application for permit revision when the applicant does not provide sufficient operational data to demonstrate that reclamation, as required by SMCRA and the Tennessee Federal program, can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Under 30 U.S.C. § 1265(b)(10)(A) (1982), and 30 CFR 816.41(f), OSMRE is required to avoid acid or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

Rith Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 239 (Oct. 24, 1989)

Discharges from Disturbed Areas

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

As a general rule, where discharges from disturbed areas are commingled in a sedimentation pond with discharges from areas not disturbed by the permittee's operations, the discharge from the sedimentation pond must meet the effluent limitations of the regulation. However, where a person charged with a violation of the effluent limitation can establish that the effluent violation relates solely to drainage from areas which have not been disturbed by that person's operations, the person may escape responsibility for the violation. However, a failure to provide such

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS--Continue

Discharges from Disturbed Areas--Continued

evidence will result in an affirmation of the violation.

National Mines Corp. v. Office of Surface Mining Reclamation & Enforcement, 104 IBLA 331 (Sept. 23, 1988)  
95 I.D. 181

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

Allegations that contamination of the water discharged from a sediment pond constructed pursuant to a surface mining permit to collect waters from the disturbed area was from other than the disturbed area are of no benefit to appellant without a showing that the other area was the sole source of the contamination. Water quality limitations apply to all discharges flowing from a disturbed area into a sedimentation pond constructed to achieve compliance with SMCRA.

Innovative Development of Energy, Inc. v. Office of Surface Mining Reclamation & Enforcement, 110 IBLA 119 (Aug. 8, 1989)

Disturbed Areas

A prima facie case that surface drainage left the permit area, may be established by evidence of present or past drainage from a disturbed area flowing off the permit area. Alternatively, a prima facie case may be established by demonstrating that, under the conditions existing at the minesite at the time of inspection, there is a reasonable likelihood that surface

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS--Continued

Disturbed Areas--Continued

drainage from a disturbed area would leave the permit area without passing through a sedimentation pond.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)

Sedimentation Ponds

A cessation order is properly issued by OSMRE when the permittee fails to abate a notice of violation which calls for submitting, after construction, certification by a registered professional engineer, that a sedimentation pond has been built in accordance with the approved design, even though the pond had been constructed.

P&K Coal Co., Ltd. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 26 (June 2, 1987)

OSMRE will be held not to have established a prima facie case of a violation of a State regulation for failure to pass all drainage through a sedimentation pond where there is no evidence that past drainage has left the permit area other than the OSMRE inspector's conjecture based on the contour of the land.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 98 IBLA 395 (Aug. 6, 1987)

The requirement of 30 CFR 715.17(a)(1), that all surface drainage from the disturbed area be passed through a sedimentation pond before it leaves the permit area is a preventive measure; a showing of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of the regulation.

The elements of proof of a violation of the sedimentation pond requirements are: (1) the existence of surface drainage from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS--Continue

Sedimentation Ponds--Continued

(3) that the drainage left or will leave the permit area.

Under 30 CFR 715.17(a), the regulatory authority may grant exemptions from the requirement that drainage from disturbed areas be passed through a sedimentation pond, but only on the basis of a permittee's showings (1) that the disturbed drainage area within the total disturbed area is small, and (2) that a sedimentation pond is not necessary to meet effluent limitations and to maintain water quality in downstream receiving waters.

Alpine Construction Corp. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 128 (Feb. 8, 1988)  
 95 I.D. 16

The sedimentation pond requirement is a preventive measure; thus, proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation. A violation may be established where there is evidence of a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 299 (May 31, 1988)  
 95 I.D. 75

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 10 (June 22, 1988)

Where there is conflicting evidence regarding the existence of a sedimentation pond, that conflict need not be resolved where, even accepting the existence of a pond, the record shows that the pond was located off the permit area, and there is testimony that surface

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS--Continue

Sedimentation Ponds--Continued

drainage left the permit area without passing through a sedimentation pond in violation of 30 CFR 715.17(a).

C&N Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 48 (June 28, 1988)

A prima facie case that surface drainage left the permit area, may be established by evidence of present or past drainage from a disturbed area flowing off the permit area. Alternatively, a prima facie case may be established by demonstrating that, under the conditions existing at the minesite at the time of inspection, there is a reasonable likelihood that surface drainage from a disturbed area would leave the permit area without passing through a sedimentation pond.

Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 124 (July 19, 1988)

Where an Administrative Law Judge upholds a notice of violation issued on the basis that discharges from a permittee's sedimentation ponds had reaffected downslope areas outside the permit area by causing erosion, but the evidence submitted at a hearing on the notice of violation establishes that previous mine operators had placed spoil on the downslope; that they had abandoned the minesite without stabilizing or reclaiming the downslope area; that the permittee did not commence its operations until many months after abandonment; and there is testimony that there were no discharges from those ponds, the Administrative Law Judge's decision will be reversed.

H&B Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 103 IBLA 286 (Aug. 3, 1988)



SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WORDS AND PHRASES

"All anticipated mining." In the absence of either a statutory or regulatory definition of "all anticipated mining," OSM's 1981 interpretation of that phrase in secs. 507(b)(11) and 510(b)(3), 30 U.S.C. § 1257(b)(11) and 30 U.S.C. § 1260(b)(3), (1982), to include all future mining for which a permit application had been filed, as well as all present mining, was a reasonable construction. Subsequent to OSM's interpretation, this term was defined at 30 CFR 701.5 under the heading "cumulative impact area" to include, in addition to the above, all operations required to meet diligent development requirements for leased Federal coal for which there is actual mine development information available.

Natural Resources Defense Council, Inc., et al. (Petitioners) v. Office of Surface Mining Reclamation & Enforcement (Respondent), Atlantics Richfield Co. (Intervenor), State of Colorado (Intervenor), 89 IBLA 1 (Sept. 27, 1985) 92 I.D. 389

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

Tommy Carpenter et al., 88 IBLA 286 (Sept. 10, 1985) 92 I.D. 383

"Operator." Identification of the "operator" responsible for payment of reclamation fees under sec. 402(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a literal interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WORDS AND PHRASES--Continued

the coal is responsible for payment of the reclamation fees.

McWane Coal Co., Inc., 95 IBLA 1 (Dec. 11, 1986) 93 I.D. 460

"Dredging." Dredging to recover coal from a lake or river is a surface coal mining operation as defined in the Surface Mining Control and Reclamation Act of 1977. A company in the business of dredging sand, gravel, and coal from a river is required to pay reclamation fees pursuant to the Surface Mining Control and Reclamation Act of 1977 unless otherwise exempted by the Act.

Cumberland Reclamation Co., 102 IBLA 100 (Apr. 18, 1988)

"Incidental." The extraction of coal is not incidental to the extraction of other minerals where the mining of coal is essential to the economic viability of the mine; the coal is the deepest strata mined for commercial use or sale; the acreage of the shallower deposits extracted for commercial use or sale is less than 50 percent of the acreage of the coal deposit extracted; the acreage of the mineral deposit immediately above the coal seam extracted is less than 5 percent of the acreage of coal extracted; and the decision to mine the deposit immediately above the coal is based on the decision to mine the coal.

McNabb Coal Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 282 (Mar. 15, 1988)

"Appropriate contour." "Appropriate contour" in 30 CFR 715.14(e) is not synonymous with "approximate original contour," but the regulation requires that all highwalls be eliminated by grading.

Donaldson Creek Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 111 IBLA 289 (Oct. 26, 1989)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977  
--Continued

WORDS AND PHRASES--Continued

"Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (1982), and 30 CFR 700.11(a)(3), which exclude the "extraction of coal as an incidental part of Federal, State, or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction.

Wilder Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 107 (Nov. 30, 1989)

"Supervised by an Indian tribe." As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian owns either the mineral estate, the surface estate in fee, or both.

Valencia Energy Co., et al., 109 IBLA 40 (May 26, 1989)  
 96 I.D. 239

"Surface coal mining operations." The stockpiling of coal from an underground mine will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1982), where the evidence establishes that such stockpiling was incident to the surface operations of the mine.

Valley Camp Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 112 IBLA 19 (Nov. 16, 1989)  
 96 I.D. 455

SURFACE RESOURCES ACT  
(See also Hearings, Mining Claims--if included in this Index.)

GENERALLY

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

United States v. Anna Wirz, 89 IBLA 350 (Nov. 20, 1985)

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone, sand and gravel, cinders, and certain other materials are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

United States v. Leroy S. Johnson et al., 100 IBLA 322 (Dec. 31, 1987)

MANAGEMENT AUTHORITY

Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or processing operations, or uses

SURFACE RESOURCES ACT--ContinuedMANAGEMENT AUTHORITY--Continued

reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989) 96 I.D. 315

SURVEYS OF PUBLIC LANDS

(See also Boundaries, Public Lands--if included in this Index.)

GENERALLY

"protraction survey" or "protraction diagram." A "protraction survey" or "protraction diagram," which consists of lines drawn on a map that follow the public land survey system, but which is not based upon a field survey with monumentation, is not an official survey and therefore the requirement that a placer mineral patent application be accompanied by a mineral survey of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

Where lands in a grant or patent from the United States are described in terms of the rectangular surveying system, the right, title, or interest acquired thereby is that defined by the corners of the original Government survey upon which the description is based.

A survey of public lands creates and does not merely identify the boundaries of sections of land. A patentee of public land takes according to the actual survey on the ground, even though the official survey

SURVEYS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

plat may not show the tract as it is located on the ground, or the patent description may be in error as to the quantity of land stated.

Where a plat of resurvey indicates that more land is included within the boundaries of a patented tract than was shown by the plat of original survey in accordance with which the patent was issued, the boundaries of the patented tract as established by the original survey, and not the acreage indicated on the plat of the original survey, determine the quantity of land which was conveyed by the patent.

Robert R. Perry, 87 IBLA 380 (June 28, 1985)

The Secretary of the Interior is authorized to consider and determine the extent of the public lands. This authority includes the authority to survey parcels conveyed from Federal ownership which border public lands. Where a Government survey of a private claim is challenged, the protestant must establish by clear and convincing evidence the survey is not an accurate portrayal of the lands conveyed.

John D. Carter, Sr., Verna R. Carter, 90 IBLA 286 (Feb. 13, 1986)

BLM may properly reject a color-of-title application filed pursuant to sec. 1 of the Color of Title Act, as amended, 43 U.S.C. § 1068 (1982), where the document relied upon as initiating color of title does not on its face purport to convey the claimed land, regardless of whether a contemporaneous county survey included the land in the conveyance and claimant has subsequently occupied the land.

Dale F. Fattig, 90 IBLA 323 (Feb. 25, 1986)



SURVEYS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

Prior to passing title from the United States, the Government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. Where, pursuant to a cadastral resurvey, all lands have been patented to private owners, disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located.

Sarah & Magie Calvin, 94 IBLA 162 (Oct. 28, 1986)

Where, in computing the acreage of a parcel of land for purposes of arriving at its fair market value in a conveyance to a color-of-title applicant, BLM relied on planimetric measurements of the parcel as depicted on older survey plats and field notes and there is evidence the acreage may subsequently have changed through erosion or accretion, the Board will remand the case to BLM for a resurvey to determine the acreage actually existing in the tract on the date of appraisal.

Weatherstby Godbold Carter, Richard T. Harriss, III, 97 IBLA 108 (Apr. 29, 1987)

SURVEYS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

Where there is a lack of evidence in the record that BLM provided interested parties an opportunity to file objections to the official filing of a plat of resurvey prior to such filing, objections filed subsequently will not be subject to dismissal as untimely protests under 43 CFR 4.450-2. Rather, they will be considered as objections to the resurvey lodged with BLM, and BLM's adjudication of those objections will result in a decision which is subject to appeal to the Board of Land Appeals.

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

SURVEYS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

In apportioning accreted lands between adjoining sections, BLM properly disregards partition lines previously determined by proportioning the new frontage between two zero accretion points, one of which is within an area which has subsequently been determined to have formed through the process of avulsion.

BLM is not required under the doctrine of either bona fide rights or equitable estoppel to accept a line which has been surveyed on the ground with appropriate monumentation but which has never been officially approved by BLM, even where private landowners may have relied on the monuments in purchasing land and constructing improvements.

In apportioning accreted land between adjoining sections, BLM is not required to use a privately surveyed partition line established by the perpendicular method where the private surveyor had no adequate justification for not employing the proportionate shoreline method and, thus, the line was not within the allowable limit of error.

Where BLM has failed to adequately justify not employing the proportionate shoreline method for apportioning accreted land between adjoining sections and that approach will result in an equitable apportionment of the accreted land, the Board will remand the case to BLM for adoption of that method in a corrected survey.

First American Title Insurance Co. v. Bureau of Land Management, Fort Mojave Indian Tribe (Intervenor), 110 IBLA 25 (July 7, 1989)

The Board has no jurisdiction to adjudicate the propriety of a survey conducted by or on behalf of the Forest Service or of decisions by the Forest Service accepting such survey. However, such surveys do not constitute official surveys of the public lands of the United States, as the authority to conduct such surveys and resurveys is vested solely in the Secretary of the Interior, who in turn has delegated this authority to BLM. Thus, a Forest Service survey does not effect any change in the location of a corner, but is merely an

SURVEYS OF PUBLIC LANDS--ContinuedGENERALLY--Continued

administrative survey which the Forest Service uses in managing the National Forests.

An appeal from a BLM decision dismissing a protest of a BLM dependent resurvey which did not affect any corner or line separating Federal from the protestant's private land will be dismissed where the protestants were not adversely affected by the decision.

An appellant will not be regarded as having established by a preponderance of the evidence that a section corner was fraudulently established where, despite discrepancies in the internal features of other sections in the township between the original survey plat and the modern record, the original plat and modern record generally agree in the area of the disputed corner.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

AUTHORITY TO MAKE

Surveys of privately owned lands may not be conducted by the Department at public expense.

Titus O. Nashookpuk, Sr., 99 IBLA 213 (Oct. 15, 1987)

DEPENDENT RESURVEYS

Where a party challenging acceptance of a dependent resurvey presents sufficient evidence to raise a question of fact whether the dependant resurvey is an accurate reestablishment of a section line, the Board will order a fact-finding hearing pursuant to 43 CFR 4.415.

Stoddard Jacobsen, Robert C. Downer, 85 IBLA 335 (Mar. 22, 1985)

SURVEYS OF PUBLIC LANDS--ContinuedDEPENDENT RESURVEYS--Continued

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

Prior to passing title from the United States, the Government has the right to establish or reestablish boundaries on its own land. However, once patent has been issued, the rights of the patentee are fixed and the Government has no power to interfere with such rights by a corrective survey. Where, pursuant to a cadastral resurvey, all lands have been patented to private owners, disputes concerning boundaries between private owners are matters for the jurisdiction of the state court where the lands are located.

Sarah & Magie Calvin, 94 IBLA 162 (Oct. 28, 1986)

A corner will be regarded as lost where the evidence fails to establish beyond a reasonable doubt that monuments or accessories are those set in the original survey, or that the corner has been perpetuated, or that collateral evidence with respect to courses and distances to known corners or intervening topographical and geographical items on line described in the field notes of the original survey identify the original position of the corner.

Stoddard Jacobsen & Robert C. Downer v. Bureau of Land Management, 97 IBLA 182 (May 8, 1987)

SURVEYS OF PUBLIC LANDS--ContinuedDEPENDENT RESURVEYS--Continued

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where one protests a 1966 dependent resurvey in 1984 on the basis that BLM improperly established a lost corner within a township by one-point control, BLM's decision denying that protest will be vacated where the person establishes by a preponderance of the evidence that BLM's determination to use one-point control constitutes gross error because there is not sufficient justification in the record for departing from the 1947 Survey Manual requirement to use two-point control.

Peter Paul Groth, 99 IBLA 104 (Sept. 22, 1987)

A person challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Where the record presents unresolved questions of fact as to whether there are adequate reasons supporting BLM's departure from the usual method of apportioning accreted lands, the Board will refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions.

First American Title Insurance Co., 100 IBLA 270 (Dec. 16, 1987)

The proper standard for the Bureau of Land Management to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Stoddard Jacobsen & Robert C. Downer, Bureau of Land Management (On Reconsideration), 103 IBLA 83 (July 8, 1988)



SURVEYS OF PUBLIC LANDS--ContinuedDEPENDENT RESURVEYS--Continued

Generally, the Board will dismiss an appeal challenging the results of a dependent resurvey if the lands on both sides of the disputed boundary have been patented to private owners prior to the time the protest is lodged.

A resurvey conducted by the Cadastral Survey is improperly undertaken to the extent it establishes boundaries between private tracts of land if the survey of those boundaries is not necessary to establish a boundary between private and Federal lands. Once patent has been issued, the rights of the patentees are fixed and the Government has no power to interfere with such rights by resurveying the boundaries.

James S. Mitchell, William Dawson, 104 IBLA 377 (Sept. 27, 1988)

An appellant will not be regarded as having established by a preponderance of the evidence that a section corner was fraudulently established where, despite discrepancies in the internal features of other sections in the township between the original survey plat and the modern record, the original plat and modern record generally agree in the area of the disputed corner.

Wilogene Simpson et al., 110 IBLA 271 (Sept. 13, 1989)

OMITTED LANDS

Where BLM publishes in the Federal Register notice of intent to file a plat of dependent resurvey and omitted lands survey and subsequently, in response to objections, publishes notice in the Federal Register of the staying of the filing stating the plat will not be filed "until the day after all protests have been resolved or subsequent appeals have been decided by the Interior Board of Land Appeals," yet proceeds to file the plat prior thereto and without further notification to the public, on appeal the Board of Land Appeals will vacate such filing.

The general rule regarding lands patented according to an official plat of survey showing a meander line along a lake or other body of water is that the actual shore line rather than the meander line is the

SURVEYS OF PUBLIC LANDS--ContinuedOMITTED LANDS--Continued

boundary, the meander line being intended to ascertain the approximate acreage in the fractional subdivision. An exception to this rule arises where lands are omitted from the official plat of survey because of gross error or fraud in establishing the meander line.

Where, on appeal, the question is presented whether certain lands were omitted from the original survey because of gross error or fraud in establishing the meander line of a lake, the case may be referred to the Hearings Division for a hearing to develop fully the factual record critical to disposition of such a case.

Lawyers Title Insurance Corp., 92 IBLA 162 (June 6, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which on its face purports to convey the claimed land to the applicant or the applicant's predecessors. Where the land sought is omitted land lying adjacent to a lake and the document relied upon describes the land in accordance with a Government survey which shows the land as lakeshore property, such a document on its face purports to convey the claimed land.

James E. Gaylord, Jr., 94 IBLA 392 (Dec. 9, 1986)

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which, on its face, purports to convey the claimed land to the applicant or the applicant's predecessors.

Loyla C. Waskul, 102 IBLA 241 (May 19, 1988)

SURVEYS OF PUBLIC LANDS--ContinuedOMITTED LANDS--Continued

An island, whether located in navigable or non-navigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

Olive Wheeler, 108 IBLA 296 (Apr. 27, 1989)

TAYLOR GRAZING ACT

(See also Grazing Leases, Grazing Permits & Licenses-- if included in this Index.)

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(2), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

Joe B. Fallini, Jr., et al. v. Bureau of Land Management, 92 IBLA 200 (June 12, 1986)

TIMBER SALES AND DISPOSALS

In the absence of a timely written request for an extension of a timber sale contract, pursuant to the terms thereof, BLM may properly treat the right of the holder of the contract to cut and remove timber as

TIMBER SALES AND DISPOSALS--Continued

having expired at the end of the contract's extended term.

David G. Aden, 84 IBLA 303 (Jan. 3, 1985)

A party seeking to establish that BLM has violated applicable policies regarding clearcutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

Sec. 1 of the Act of Aug. 28, 1937, 43 U.S.C. § 1181a-1181f (1982), requires that revested Oregon and California Railroad lands classified as timberlands shall be managed (with one exception) for permanent forest production and that the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

Authority for BLM's clearcut harvest of low-intensity lands, whose timber forms no part of allowable cut, is found in sec. 307(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1737(a) (1982), wherein the Secretary is authorized to conduct investigations, studies, and experiments on his own initiative or in cooperation with others involving the management, protection, development, acquisition, and conveying of public lands.

In re Upper Floras Timber Sale et al., 86 IBLA 296 (May 13, 1985)

A decision to implement a timber sale proposal based on a finding of no significant impact may be remanded where the environmental assessment for the sale, which supplements and is tiered to the programmatic environmental impact statement for the 10-year timber management program in the district, fails to adequately consider the site-specific impacts of the sale including any aspects of the timber sale which

TIMBER SALES AND DISPOSALS--Continued

vary significantly from the parameters considered in the programmatic environmental impact statement.

In re Humpy Mountain Timber Sale, 88 IBLA 7 (June 28, 1985)

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case files remanded for supplementation of the EA to consider the alternative which it failed to study.

State of Wyoming Game & Fish Comm'n, 91 IBLA 364 (Apr. 24, 1986)

A party seeking to establish that BLM has violated applicable policies regarding clear-cutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

In re Trailhead Timber Sale et al., 97 IBLA 8 (Apr. 20, 1987)

When the high bidder at a timber sale fails to tender the executed contract and the required performance bond, and has failed to make written request for an extension of the time for compliance within 30 days after receipt of the contract, under the governing regulation, the high bidder will forfeit the right to receive the contract and the bid deposit shall be retained as liquidated damages.

Wallace Creek Sawmills, 97 IBLA 177 (May 8, 1987)

A protest of a BLM declaration that a party is the successful high bidder at a timber sale is not a protest of a timber management decision governed by 43 CFR 5003.3, as the protesting party has no way of knowing who may bid at the sale or who will submit the high bid at the time a decision to conduct a sale is

TIMBER SALES AND DISPOSALS--Continued

published. The regulations applicable to such protests are those found at 43 CFR 4.450-2.

Internat'l Paper Co., 98 IBLA 52 (June 5, 1987)

A BLM decision to proceed with a proposed timber sale will not be disturbed on appeal where the appellant has not established that BLM failed to consider relevant matters of environmental concern, such as the impact on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

In re Blackeye Again Timber Sale, 98 IBLA 108 (June 15, 1987)

In re Crane Prairie Timber Sale, 109 IBLA 188 (June 12, 1989)

In calculating the entitlement of a purchaser to a buy-out of BLM and Forest Service timber sale contracts under 43 CFR 5475.2-2(a), BLM may aggregate the total remaining volume of BLM contracts as of Jan. 1, 1982, of as determined by BLM, and the total remaining volume of Forest Service contracts as of Jan. 1, 1982, as determined by the Forest Service in accordance with its regulations, in order to derive the total remaining volume of uncut timber under both types of contracts.

Freres Lumber Co., Inc., 100 IBLA 176 (Dec. 8, 1987)

The Board will affirm a decision to proceed with a proposed timber sale when the record indicates that BLM adequately considered all relevant factors and appellant has failed to meet its burden of showing error in BLM's decision.

In re Letz Boogie Timber Sale, 102 IBLA 137 (Apr. 25, 1988)



TIMBER SALES AND DISPOSALS--Continued

Under 43 U.S.C. § 1181a (1982), reverted Oregon and California Railroad Grant land which is classified as timber land must be managed under sustained yield principles for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, contributing to the economic stability of local communities and industries, and providing recreational facilities.

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

Under regulations promulgated at 50 CFR Part 402, consultation with the Fish and Wildlife Service is required with respect to a timber sale conducted by the Bureau of Land Management only when BLM determines that the timber sale would affect a listed species or its habitat, unless the sale is a major Federal action significantly affecting the quality of the human environment within the meaning of 42 U.S.C. § 4332(2)(C) (1982).

The mere award of a timber contract by the Bureau of Land Management does not violate the Migratory Bird Treaty Act.

Upper Mohawk Community Council, Oregon Natural Resources Council, 104 IBLA 382 (Oct. 3, 1988)

A BLM decision denying a protest of a proposed timber sale will not be disturbed on appeal where the appellant's objections to BLM's determination to proceed with the sale are carefully considered by BLM and the appellant fails to establish that BLM did not adequately consider matters of environmental concern, such as the impact on stream quality, visual

TIMBER SALES AND DISPOSALS--Continued

resources, and cumulative impacts on past and reasonably foreseeable future timber sales.

A charge that BLM failed to consider in its environmental assessment reasonable alternatives to a proposed timber sale will be rejected where the record shows that the environmental assessment, and preceding environmental documents, adequately addressed appropriate alternatives. BLM is not required to discuss every conceivable alternative which could be devised. A mere disagreement or a difference of opinion as to a proper alternative will not suffice to establish error in BLM's choice of alternatives.

In re Long Missouri Timber Sale, 106 IBLA 83 (Dec. 12, 1988)

TITLE

With respect to disputes between rival mining claimants concerning which claimant has the superior right to possession of a claim, a court of competent jurisdiction is the proper forum.

Wells J. Horvereid, 88 IBLA 345 (Sept. 24, 1985)

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed. Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

Suzanne Walsh, 98 IBLA 363 (July 31, 1987)

TOWNSITES

Where a tract of land was segregated for townsite purposes but not entered or surveyed as a townsite as of Dec. 18, 1971, the land is eligible for conveyance to a Native village corporation despite a reservation in that conveyance of valid existing rights.

City of Klawock, 94 IBLA 107 (Oct. 7, 1986)

The occupants of townsite lots at the time of approval of subdivisional survey are entitled to deeds to those lots from the townsite trustee pursuant to the regulation at 43 CFR 2565.3(c). An application for deed filed on behalf of a party not in occupancy at the time of subdivisional survey is properly rejected by the trustee.

Bristol Bay Housing Authority, 95 IBLA 20 (Dec. 12, 1986)

TRESPASSGENERALLY

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

Bureau of Land Management v. David & Bonnie Ericsson, 88 IBLA 248 (Sept. 4, 1985)

Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986)  
93 I.D. 179

TRESPASS--ContinuedGENERALLY--Continued

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1982), and its implementing regulations.

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987)  
94 I.D. 1

In addition to assessing a trespasser on the public lands a measure of damages for the trespass, BLM may also collect from that person the administrative costs incurred by the United States as a result of that trespass.

Henry Deaton, 101 IBLA 177 (Feb. 17, 1988)

Where the Bureau of Land Management has assessed treble damages for a willful trespass for the unauthorized removal of sand and gravel in excess of that stated in a contract for sale of sand and gravel, but the record is unclear how BLM computed trespass volume and the Bureau's appraised value of sand and gravel deposits is challenged, there is sufficient

TRESPASS--ContinuedGENERALLY--Continued

question of fact for the Board to exercise its discretionary authority to order a hearing on the matter before an Administrative Law Judge pursuant to 43 CFR 4.415.

Connie Nielson, 102 IBLA 195 (May 6, 1988)

The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

Lazy VD Land & Livestock Co., 108 IBLA 224 (Apr. 19, 1989)

BLM may properly require the removal of structures unintentionally erected in trespass upon public land. However, a decision requiring removal of such structures, which are located in a riparian area, based on a conclusion that under BLM's Riparian Area Management Policy disposal would not be in the public interest, will be vacated where there is not a rational basis, in the record to support such action.

Clive Kincaid, 111 IBLA 224 (Oct. 17, 1989)

MEASURE OF DAMAGES

Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral

TRESPASS--ContinuedMEASURE OF DAMAGES--Continued

or (2) the market value of the severed and crushed rock less the expenses of severing it and crushing it.

Harney Rock & Paving Co., 91 IBLA 278 (Apr. 14, 1986) 93 I.D. 179

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John N. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the surface reasonably incident to mining or removal, as that is the interest reserved.

Curtis Sand & Gravel Co., Estate of Clare Schweitzer, 95 IBLA 144 (Jan. 12, 1987) 94 I.D. 1

The unauthorized removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass against the United States. The fact that the United States could not presently dispose of the deposit does not affect either the right of the United States to recover damages for the trespass nor the valuation of the deposit so removed.

The right of a surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), for damages to the surface occasioned by the removal of minerals reserved under



TRESPASS--ContinuedMEASURE OF DAMAGES--Continued

that Act is limited to the value of crops, permanent improvements, and damages to the land for grazing purposes.

In determining the amount of damages due to the United States for the unauthorized removal of reserved mineral deposits by the surface owner, it is necessary to first ascertain the in-place value of the mineral deposit and then subtract from this figure the amount of surface damages compensable under 43 U.S.C. § 299 (1970) and 30 U.S.C. § 54 (1982).

United States v. Browne-Tankersley Trust, 98 IBLA 325 (July 31, 1987)

When an individual willfully trespasses on the public lands and drills a water well, the measure of damages in such a case is a matter of the law of the state where the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

Henry Deaton, 101 IBLA 177 (Feb. 17, 1988)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)  
(See also Appeals--if included in this index.)

GENERALLY

The amounts payable for property acquisitions and for relocation assistance benefits are separate and distinct entitlements, and there is no authority in the Act and the Department's implementing regulations for inclusion in the contract of sale and in the deed to the United States of provisions requiring the vendor/grantor to reimburse the United States for allowed relocation assistance benefits resulting from the acquisition.

Uniform Relocation Assistance Appeal of Kurtz Brothers, Inc., Thomas D. Moriarty (Intervenor), 6 OHA 228 (Aug. 28, 1986)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

GENERALLY--Continued

A claim for compensation from the Park Service for entering upon the claimants' property for the purpose of processing their benefits claim is properly denied on the basis that the Act and the implementing regulations do not provide for such payment.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

To the extent any information given by a Park Service representative may have suggested to claimants that they would be reimbursed for payment of fees for recordation of prior conveyance documents to perfect their record title to the lands conveyed to the United States, such advice was erroneous and cannot serve as a basis for creating any rights in claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter W. Lind, 7 OHA 119 (Sept. 15, 1987)

To the extent any information given by a Park Service representative may have suggested to claimants that the representative promised they would be found eligible for a fixed payment under a loss of business claim if they applied for it, such information was erroneous and cannot serve as a basis for creating any rights in claimants which are not authorized by law.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Forrest L. Harmon, 7 OHA 151 (Oct. 29, 1987)

To the extent any information given by a Bureau of Reclamation representative may have suggested to claimants that relocation assistance benefits would be allowed in the amount of their claims, such advice was erroneous and cannot serve as a basis for creating

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

GENERALLY--Continued

rights in the claimants which are not authorized by law.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

ADMINISTRATIVE REVIEW AND APPEALS

Where appellants withdraw their appeals to the extent of matters settled by agreement of the parties during the pendency of the appeals, the withdrawal will be accepted and the appeals will be dismissed, with prejudice, as to the settled matters.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

Where the Bureau of Reclamation, upon review of a reconsideration request, determines that the full amount of benefits claimed for costs in a self-move or residential personal property is reasonable and necessary in the circumstances of the move, and approves that amount for payment, the issue of the amount of allowable benefits for such moving costs is rendered moot and the reconsideration request is properly dismissed to that extent and the prior decision of this Office on the benefits claim is so modified.

Where a request for reconsideration has been granted and the record evidence in support of the benefits claims concerned is insufficient to demonstrate claimants' eligibility for the benefits sought, the claims will remain disallowed.

Uniform Relocation Assistance Appeals of Clayton Lyles (Mr. & Mrs.), & Messrs. Lonnie & Owen Lyles (On Reconsideration by Director), 8 OHA 94 (Sept. 21, 1989)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM REAL PROPERTY ACQUISITION POLICY

Generally

Departmental regulations implementing the Act provide for rental charges to a former tenant who is permitted to continue in short-term occupancy of the real property after its acquisition by the United States, at a rate which is not more than the fair market value of the property to a short-term occupier.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

Expenses Incidental to Transfer of Title to the United States

Additional real estate taxes incurred by the grantor of the acquired lands as a result of transfer of the lands to the United States, because for more than three years the lands, while owned by the grantor, enjoyed a lower tax assessment on the basis of farm or agricultural use, do not qualify for reimbursement as expenses incidental to conveying the real property to the United States under sec. 303 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of George C. Vournas, 6 OHA 23 (Mar. 25, 1985)

Where the record shows prepayment penalty costs incurred by the grantor of the acquired property to the United States were both necessary and reasonable, they are reimbursable under § 303(2) of the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Bonnie C. Cord, 7 OHA 99 (July 1, 1987)

## UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY

ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

## UNIFORM REAL PROPERTY ACQUISITION POLICY--Continued

Expenses Incidental to Transfer of Title to the United States--Continued

Expenses incidental to transfer of title to the United States, reimbursable under § 303(1) of the Act and implementing regulations of the Department, do not include fees for recordation of prior conveyance documents to perfect the record title of the grantors of the lands to the United States.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter W. Lind, 7 OHA 119 (Sept. 15, 1987)

Special capital gains taxes, assessed by law of the State of Vermont against the grantors of lands acquired by the United States because they had held the property for a period of less than 6 years, do not qualify for reimbursement as expenses incidental to conveying the real property to the United States under § 303(1) of the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. David E. Collins, 7 OHA 224 (July 18, 1988)

Where the record shows reimbursement was allowed for the pro rata portion of prepaid real property taxes allocable to the period of the calendar year remaining after vesting of title to the lands in the United States, the allowance, being fair and reasonable for expenses necessarily incurred incidental to the transfer of title to the real property to the United States, will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Peter P. Isaza, 8 OHA 89 (Aug. 11, 1989)

## UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY

ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

## UNIFORM RELOCATION ASSISTANCE

## Generally

Where the claim for a fixed schedule payment of a moving expense allowance and a dislocation allowance, in lieu of actual reasonable moving and related expenses, was filed after the time limitation prescribed by Departmental regulations implementing the Act, and the evidence of record does not justify an extension of the time for filing of the claim, the denial of the claim will be affirmed.

Uniform Relocation Assistance Appeal of George W. Schaeffer, Jr., 6 OHA 1 (Jan. 31, 1985)

The late filing of a benefits claim will be deemed to have been waived where, at the request of the claimant, the denial of the claim for late filing is reconsidered and the claim is disallowed on another basis.

A person who moved personal property from lands acquired by the United States prior to the acquisition of such lands by the United States and without being instructed to do so by the acquiring agency, is not a displaced person eligible for reimbursement of moving and related costs with respect to such property under the Act and the Department's regulations.

Uniform Relocation Assistance Appeal of Highway Pavers, Inc., 6 OHA 38 (June 18, 1985)

Persons required to remove their improvements from acquired lands as a result of termination of special use permits previously issued to them by the Park Service involving those lands are not displaced persons within the meaning of the Relocation Act and the Department's implementing regulations, and, consequently, they are not eligible to receive moving payment benefits under the Act.

Persons are not eligible as displaced persons under the Relocation Act and the Department's implementing regulations for moving expenses, or compensation, with respect to removable improvements on lands acquired by the United States from the State of Florida where they had the right or obligation,



UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY

ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987) --Continued

UNIFORM RELOCATION ASSISTANCE --Continued

Generally--Continued

under terms of a grazing permit from the predecessor in interest to the State of Florida, to remove the improvements upon termination of the permit but failed to do so. Displacement in the circumstances resulted from termination of the permit and not the acquisitions by the State of Florida or the United States.

Uniform Relocation Assistance Appeals of Robert S. Bass, Jr., et al., 6 OHA 128 (Mar. 24, 1986)

Where claimants commenced occupancy of acquired lands after the lands were acquired by the United States and subsequently moved from the lands upon written notice to vacate from the Park Service, the claimants did not move as a result of the acquisition of the property by the United States and consequently are not eligible as displaced persons for benefits under secs. 202 and 204 of the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Mr. Patrick J. O'Hara & Ms. Sandra Gavin, 7 OHA 28 (Nov. 18, 1986)

A claim for a payment to cover possible Federal income tax costs with respect to benefits received for displacement from a business operation is properly denied on the basis that the Act and the Department's implementing regulation provide the benefits payments shall not be considered as income for purposes of the Internal Revenue Code.

A claim for a payment to cover professional costs which are incurred due to the election of the claimant for benefits to be represented by an attorney or accountant must be denied on the basis that the Act and the Department's implementing regulations do not provide for payment of such expenses.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987) --Continued

UNIFORM RELOCATION ASSISTANCE --Continued

Generally--Continued

Benefits are not allowable under the Act and the Department's regulations to compensate displaced persons for the mortgage balance remaining due from them on acquired property.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

Moving and Related Expenses

Generally

A determination disallowing a claim for a benefits payment for tangible personal property losses will be affirmed where the claimant has not shown its entitlement to such benefits.

Uniform Relocation Assistance Appeal of Highway Pavers, Inc., 6 OHA 38 (June 18, 1985)

Where a person had oral and written contractual authority from a tenant of the record titleholder of real property to stockpile, store, and remove topsoil and gravel material on the property, and such authority did not expire but was terminated by the tenant and the record titleholder jointly, at the request of the Government as a condition precedent to acceptance of an offer to sell the real property concerned and other lands by the record titleholder, loss of the contractual authority was due to the acquisition of the realty by the Government, and the person whose contracts were so terminated is properly considered a displaced person eligible for allowable moving costs and related expenses under sec. 202 of the Act and implementing regulations of the Department with respect to its topsoil and gravel materials remaining on the lands at the time of the Government's acquisition of the lands.

Where stockpiled topsoil and gravel materials, prepared and processed for marketing purposes, have been leveled by the record titleholder of the lands and his tenant, at the request of the Government as a condition precedent to acceptance of an offer to sell

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

the real property concerned and other lands by the record titleholder, the owner of the materials is entitled, as a displaced person, to a benefits payment in the amount of the fair market value of this personal property for continued use at its location at the time of displacement, or the estimated cost of moving it within a radius of 50 miles, whichever is less, under sec. 202 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of Kurtz Brothers, Inc., Thomas D. Moriarty (Intervenor), 6 OHA 228 (Aug. 28, 1986)

A payment of \$7,333.33 in accordance with 42 U.S.C. § 4622 (1982), for a license to remove boulders and other materials is reasonable in light of the relatively insubstantial legal rights of such a property interest.

Uniform Relocation Assistance Appeal of Forrest L. & Dona M. Harmon, 7 OHA 34 (Dec. 17, 1986)

Expenses claimed for reinstallation of personal property, for making necessary modifications, and for reconnection of certain utilities in the replacement dwelling are not reimbursable as moving and related expenses where they are shown to represent costs for improvements and for additions to the replacement dwelling rather than costs for reestablishment and reconnection of such facilities as personal property owned by the claimant and moved from the acquired dwelling to the replacement dwelling.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

Where appellants fail to establish entitlement to reimbursement for actual moving and related expenses in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Glen M. Zizka, 7 OHA 58 (Apr. 13, 1987)

Leasing commissions for negotiating and consummating a lease of office space to which the displaced business was relocated, paid by the landlord of the replacement business site to separate brokers representing the landlord and the owners of the relocated business, respectively, are not compensable as moving and related expenses under the Act and the Department's implementing regulations. Such expenses, being related to the business use of property to which the business was relocated, are properly borne by the owners of that property as business-related expenses.

Uniform Relocation Assistance Appeal of Charles Pankow Builders, Inc., 7 OHA 70 (Apr. 28, 1987)

Costs for call-forwarding telephone service are additional operating expenses of a business incurred because of operating in a new location and as such they are not compensable under regulations of the Department implementing the Act.

Uniform Relocation Assistance Appeal of Carroll/Cahill Associates, 7 OHA 73 (May 5, 1987)

A non-profit organization may be reimbursed for actual and reasonable costs of providing notice to its clientele of the location of its replacement business site.

Uniform Relocation Assistance Appeal of Northern California Broadcasting Ass'n, 7 OHA 75 (May 7, 1987)



UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

Leasing brokerage commissions paid by the lessor of replacement business offices are not reimbursable as moving and related expenses of the relocated business.

Uniform Relocation Assistance Appeal of Economics Research Associates, 7 OHA 102 (July 20, 1987)

Costs for call-forwarding telephone connection services are additional operating expenses of a business incurred because of operating in a new location and as such they are ineligible for reimbursement as moving and related expenses under regulations of the Department implementing the Act.

Reasonable and necessary costs of replacing stationery on hand at the time of displacement that are made obsolete as a result of the move are reimbursable as moving and related expenses under regulations of the Department implementing the Act.

Costs of moving any structure or other real property improvement in which the displaced person reserved ownership are not reimbursable under the Act and the Department's implementing regulations.

Uniform Relocation Assistance Appeal of Silk & Marois (a law corporation), 7 OHA 104 (Aug. 3, 1987)

Where appellant fails to establish entitlement to reimbursement for actual reasonable moving costs and related expenses in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of See & Sea Travel, Inc., 7 OHA 109 (Aug. 6, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Generally--Continued

Documentation is necessary of actual reasonable moving and related expenses incurred in a self move of household personal property in order to determine the amount of the allowable payment to the displaced persons as reimbursement of such expenses under sec. 202(a)(1) of the Act and the implementing regulations.

A claim under sec. 202(a)(2) of the Act for costs of moving cattle from a farming and ranching operation for purposes of liquidation is properly disallowed where the evidence shows the cattle were moved and the costs were incurred in anticipation of the Government's acquisition of a flowage easement affecting a portion of the farm land and not as a result of that acquisition and displacement from the farming and ranching operation.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Where claimants fail to establish entitlement to reimbursement for actual reasonable moving and related expenses under sec. 202(a)(1) of the Uniform Act, as amended in an amount greater than that allowed by the National Park Service in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

Where the record shows costs for electricity installation are costs for adding facilities to the replacement dwelling rather than costs involved in reinstallation of appliances not acquired by the Government as real property, they are not reimbursable as moving and related expenses in relocating personal property.

Uniform Relocation Assistance Appeal of Mrs. Lorraine J. Mills, 8 OHA 122 (Nov. 29, 1989)



UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987) --Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Moving Expense Allowance

Generally

Separate claims for fixed payments comprised of moving expense and dislocation allowances, under sec. 202(b) of the Act, are properly disallowed where the evidence shows the dwelling on lands encumbered by the Government-acquired flowage easement from which claimants were displaced, was a single-family dwelling owned by claimants' parents, and claimants and their parents lived there together as a family unit. In such circumstances, claimants and their parents are properly regarded as one displaced person for the purpose of reimbursable moving and related expenses.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Where claimant elects to receive a fixed payment for moving expenses under sec. 202(b) of the Uniform Act, as amended, an additional payment cannot be authorized for actual moving and related expenses under sec. 202(a) of the Uniform Act, as amended.

Uniform Relocation Assistance Appeal of Mr. William E. McCarty, 8 OHA 129 (Dec. 14, 1989)

Payments in Lieu of Moving and Related Expenses

Fixed Payment(s)

Generally

Where claimants elect to receive a moving expense allowance and a dislocation allowance under § 202(b) of the Act in lieu of a payment for actual moving and

UNIFORM RELOCATION ASSISTANCE--Continued

Moving\_and\_Related\_Expenses--Continued

Payments in Lieu of Moving and Related Expenses  
--Continued

Fixed Payment(s)--Continued

Generally--Continued

related expenses under § 202(a) of the Act for reimbursement of certain actual moving and related expenses, these expenses are properly disallowed.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

Partial Taking of Farm Operation

A claim for a fixed payment under sec. 202(c) of the Act for displacement from a farm operation, in lieu of actual reasonable moving and related expenses under sec. 202(a) of the Act, is properly disallowed where the evidence shows claimants continue the prior farm operation without substantial change after the Government's acquisition of a flowage easement affecting a portion of the farm lands.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

Taking of Business Operation

A loss of business payment under § 202(c) of the Act, authorized to be made to qualified persons displaced from their business operation, is a payment in lieu of benefits allowable for moving and related expenses of the business under § 202(a) of the Act.

Uniform Relocation Assistance Appeal of Mr. & Mrs. Glen M. Zizka, 7 OHA 58 (Apr. 13, 1987)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY

ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Moving and Related Expenses--Continued

Payments in Lieu of Moving and Related Expenses  
--Continued

Fixed Payment(s)--Continued

Taking of Business Operation--Continued

Where the evidence shows displaced persons were reimbursed for actual reasonable moving and related expenses under § 202(a) of the Act with respect to all personal property removed from their dwelling on the acquired lands, in which dwelling the displacees had also conducted their financing business operation, they are not eligible for a fixed payment under § 202(c) of the Act upon a loss of business claim.

Uniform Relocation Assistance Appeal of Mr. & Mrs.  
Forrest L. Harmon, 7 OHA 151 (Oct. 29, 1987)

Where payment is claimed and allowed under sec. 202(a)(1) of the Uniform Act, as amended, for actual reasonable moving and related expenses in moving business and household property from acquired land, a further claim for a fixed payment in lieu of moving and related expenses with respect to the move of the personal property of the business from the acquired land, made under sec. 202(c) of the Uniform Act, as amended, cannot be allowed.

Uniform Relocation Assistance Appeals of Mr. & Mrs.  
Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

Replacement Housing Payment for Homeowners

Generally

Persons who moved and were residing elsewhere prior to the time the United States acquired their real property and prior to receiving a written notice from the United States to vacate the property, are not persons who moved from the property as a result of its acquisition by the United States, and, therefore, they are not displaced persons eligible for homeowners'

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY

ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

replacement housing payment benefits under sec. 203 of the Act and implementing regulations of the Department.

Uniform Relocation Assistance Appeal of Mr. &  
Mrs. George R. Darling, 6 OHA 216 (Aug. 18, 1986)

Costs for a property-line survey are not allowable as reasonable expenses incurred by displaced persons incident to the acquisition of the replacement residential property where the displaced persons have already received the maximum allowable replacement housing payment benefits under the Act and the implementing regulations.

Uniform Relocation Assistance Appeal of Mr. &  
Mrs. Thomas J. Randa, 7 OHA 66 (Apr. 22, 1987)

Where the record shows appellants were eligible under § 203 of the Act for replacement housing differential costs for \$3,000 and they received payments totalling \$2,417.50 in such benefits, the additional payment to which they are entitled is \$582.50.

Uniform Relocation Assistance Appeal of Mr. &  
Mrs. Brad Chapman, 7 OHA 112 (Aug. 19, 1987)

A determination of ineligibility for a homeowners' replacement housing payment will be affirmed where the record evidence shows the house on the acquired property was not the permanent or customary and usual residence of the claimants when the Park Service made its initial written offer to acquire the property.

Uniform Relocation Assistance Appeal of Mr. &  
Mrs. Nicholas M. Rocco, 7 OHA 163 (Feb. 19, 1988)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

A determination of ineligibility for replacement housing payment benefits under § 203 of the Act and the Department's regulations will be affirmed where the record evidence shows claimant's replacement dwelling was purchased prior to the initiation of the Government's negotiations for acquisition of the displacement property.

Uniform Relocation Assistance Appeal of Mr. Clarence S. Brown, 7 OHA 169 (Mar. 30, 1988)

A claim for replacement housing payment benefits will be remanded for further consideration upon the basis of the reasonable cost of comparable replacement housing at the time of claimant's displacement from the acquired property where the record shows the housing survey information relied upon in the decision appealed from was assembled approximately 3 years prior to the time of the claimant's displacement from the acquired property.

Uniform Relocation Assistance Appeal of Mrs. Betty A. Haas, 7 OHA 182 (May 23, 1988)

A claim for replacement housing differential payment benefits is properly disallowed where claimant, who was displaced from a mobile home on a rented homesite, relocated to a conventional dwelling with homesite which property cost more than that required for purchase of a mobile home replacement residence comparable to claimant's displacement residence, including the difference in rental costs for a comparable replacement homesite for a period of 4 years and 48 times the monthly rental for the Government-acquired site on which claimant's displacement mobile home was situated.

Uniform Relocation Assistance Appeal of Mrs. Betty A. Haas, 8 OHA 40 (Mar. 29, 1989)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Homeowners--Continued

Generally--Continued

A determination of ineligibility for replacement housing payment benefits claimed under sec. 203 of the Uniform Act, as amended, will be affirmed where the record evidence shows the displacement residence on the acquired land was not occupied by the claimants as their permanent or customary and usual residence.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Henry J. Strickland, 8 OHA 103 (Sept. 25, 1989)

Where appellant fails to establish entitlement to replacement housing payment benefits in an amount greater than that allowed in the decision appealed from, the decision will be affirmed.

Uniform Relocation Assistance Appeal of Mrs. Lorraine J. Mills, 8 OHA 122 (Nov. 29, 1989)

Uniform Relocation Assistance Appeal of Mr. William E. McCarty, 8 OHA 129 (Dec. 14, 1989)

Replacement Housing Payment for Tenants and  
Certain Others

The allowable replacement housing payment to a displaced tenant who purchases a replacement dwelling is that amount which is necessary to enable him to make a downpayment, including allowable incidental expenses described in § 203(a)(1)(C) of the Act, on the purchase of a decent, safe, and sanitary replacement dwelling, of but not in excess of \$4,000, as provided in § 204(2) of the Act.

Uniform Relocation Assistance Appeal of Tom Carolan, Individually & d.b.a. P. J. Systems, 7 OHA 47 (Mar. 18, 1987)



UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY  
ACQUISITION POLICIES ACT OF 1970 (AMENDED 1987)--Continued

UNIFORM RELOCATION ASSISTANCE--Continued

Replacement Housing Payment for Tenants and  
Certain Others--Continued

Where claimant fails to establish entitlement to relocation rental assistance payment benefits in an amount larger than that allowed by the Fish and Wildlife Service, the rejection of his request for an increase in such benefits will be affirmed.

Uniform Relocation Assistance Appeal of Mr. John A. Lorenz, 7 OHA 215 (June 30, 1988)

Claims for rental replacement housing payments under sec. 204 of the Act are properly disallowed where the evidence shows the dwelling on lands encumbered by the Government-acquired flowage easement from which claimants were displaced, was a single-family dwelling owned by claimant's parents, from whom the flowage easement was acquired, and claimants and their parents lived there together as a family unit. In such circumstances claimants and their parents are properly regarded as one displaced person for the purpose of replacement housing.

Uniform Relocation Assistance Appeals of Mr. & Mrs. Clayton Lyles & Messrs. Lonnie & Owen Lyles, 8 OHA 23 (Feb. 28, 1989)

WATER AND WATER RIGHTS

GENERALLY

When considering applications for rights-of-way privileges the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Tochotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

WATER AND WATER RIGHTS--Continued

GENERALLY--Continued

Federal reservation of water rights may be implied from withdrawal of land from the public domain and its reservation for a particular purpose.

Reservation of Federal water rights may be implied only to the extent previously unappropriated water is necessary to the primary purposes of the withdrawal and reservation of land.

A finding of implied reservation of water rights requires a determination that reservation of water was the actual, albeit unexpressed, intent of Congress.

Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III) (July 26, 1988) 96 I.D. 211

FEDERALLY RESERVED WATER RIGHTS

Sec. 4(d)(7) of the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. § 1133(d)(6), provides that nothing in that Act shall constitute an express or implied claim or denial of exemption from State water law.

The legislative history of sec. 4(d)(7) establishes that its purpose was to preclude assertion of reserved water rights based upon wilderness designation, while preserving reserved rights which antedated such designation.

Designation of Federal lands as wilderness establishes wilderness purposes as "supplemental," not primary, purposes of the lands in question.

Designation of Federal lands as wilderness does not give rise to reserved Federal water rights under the Wilderness Act.

Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III) (July 26, 1988) 96 I.D. 211

WATER AND WATER RIGHTS--ContinuedSTATE LAWS

When considering applications for rights-of-way privileges the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Toghotthele Corp., 95 IBLA 225 (Jan. 16, 1987)

WILD AND SCENIC RIVERS ACT

BLM may properly cause the holder of a special recreation permit for commercial use of a wild and scenic river to forfeit two scheduled trips where the evidence establishes that, in the preceding year's regulated use period, the permittee launched a scheduled trip without checking in at the necessary location on the day of the launch, as required by stipulations incorporated in the permit.

BLM may properly place the holder of a special recreation permit for commercial use of a wild and scenic river on a probationary status where the evidence establishes that the permittee gave his trip card to someone other than a bona fide employee, who then conducted the scheduled trip, thereby effecting a partial assignment of his permit in violation of the stipulations incorporated in his permit.

Robert L. Snook d.b.a. Beaver State Adventures, 100 IBLA 151 (Dec. 3, 1987)

It was proper for BLM to place the holder of a special recreation permit for commercial use of a wild and scenic river on probationary status. The evidence established that the permittee gave an authorized officer of BLM inaccurate information on a trip ticket. To do so was a specified violation of the permit stipulations, and the sanction imposed by BLM was called for in the permit stipulations.

Rogue Excursions Unlimited, Inc., 104 IBLA 322 (Sept. 20, 1988)

WILD AND SCENIC RIVERS ACT--Continued

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

Nothing in either the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1982), nor the Act of Oct. 12, 1976, 90 Stat. 2327, which designated the Upper Missouri Wild and Scenic River as a component of the wild and scenic river system, automatically withdrew all land within the management boundaries of the Upper Missouri Wild and Scenic River, but beyond the one-quarter mile statutory withdrawal, from the operation of the mining laws.

John R. Lynn, Joe Trow, 106 IBLA 317 (Jan. 6, 1989)

Under sec. 9(a)(iii) of the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. § 1280(a)(iii) (1982), Federal lands within one-quarter mile of the bank of a river designated as a "wild" river are withdrawn from all forms of appropriation under the mining laws. Mining claims located thereafter on such lands are properly declared null and void ab initio.

Robert L. Payne et al., 107 IBLA 71 (Jan. 30, 1989)

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

E. J. Belding, Jr., Melinda S. Belding, 109 IBLA 198 (June 12, 1989) 96 I.D. 272

WILD FREE-ROAMING HORSES AND BURROS ACT

Where the record supports the findings by an Administrative Law Judge that BLM conducted a roundup of trespassing animals in a reasonable manner, the costs imposed on the owners were reasonable, and such conduct and costs comport with the applicable regulations, the findings will not be modified on appeal.

John N. Thacker, Eugene Thacker v. Bureau of Land Management, 91 IBLA 356 (Apr. 23, 1986)

A person claiming ownership of wild free-roaming horses on the public lands must present evidence of ownership to the authorized officer who may issue authorization for a roundup, specifying a reasonable time to effect gathering of the animals claimed. The criterion as to reasonable time is met where BLM has recognized a claim for 5 years and has granted four extensions during that period to effect gathering. Where the successor in interest to the original claimant presented a claim to an uncertain number of progeny, remote by several generations from the animals of the original claim, BLM properly refused to recognize such claim.

Raymond G. Rosenlund, 94 IBLA 308 (Nov. 21, 1986)

The Bureau of Land Management may cancel a Private Maintenance and Care Agreement under the Act of Dec. 15, 1971, as amended, 16 U.S.C. § 1331 (1982), and take possession of a wild free-roaming horse under the agreement, where the evidence establishes that the adopter violated the terms of the agreement by the unauthorized destruction of another wild free-roaming horse in her custody under the agreement.

Susan A. Moll, 101 IBLA 45 (Jan. 26, 1988)

BLM may properly cancel a private maintenance and care agreement for wild or free-roaming horses upon receiving proof that the animals which are the subject of the agreement are in a deteriorated condition. Under such a circumstance, the burden of proving that the deteriorated condition was not caused by the

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

adopter's own conduct, so as to permit the agreement to remain in effect, rests with the adopter.

Mary Magera, 101 IBLA 116 (Feb. 8, 1988)

The Bureau of Land Management may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Esther E. Lenox, 102 IBLA 224 (May 11, 1988)

Where, pursuant to a Federal District court order, BLM issues a decision establishing an optimum number of wild horses for a grazing allotment and appeals are filed challenging BLM's determination of that optimum number but during the pendency of those appeals, the Federal District Court issues another order expressly directing the Secretary to remove wild horses from the allotment in excess of that optimum number and thereby judicially approving that optimum number, the appeals will be dismissed as moot.

Craig C. Downer et al., 105 IBLA 369 (Nov. 29, 1988)

An application to adopt wild free-roaming horses is properly rejected if, after receiving title to horses from BLM under a prior application filed pursuant to the wild horse adoption program, the applicant sold some of the horses to a slaughter buyer.

LeRoy Kalenze, 106 IBLA 201 (Dec. 21, 1988)

BLM may properly cancel a private maintenance and care agreement for a wild horse and repossess the horse where there is sufficient evidence of improper care of the adopted horse to establish that the adopter violated the terms of the agreement.

Grant F. Morey, 108 IBLA 354 (May 12, 1989)



WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

The Board will set aside a BLM decision to remove wild horses from a herd management area where removal is not properly predicated on an appropriate determination that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1982).

Animal Protection Institute of America, 109 IBLA 112 (June 7, 1989)

16 U.S.C. § 1333(b)(2) (1982), contains the sole and exclusive authority for BLM to remove wild horses from the public range. The statutory term "appropriate management level" has a very specific meaning in regard to removing wild horses or burros from the public range. It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration. The number of "excess" animals the Secretary is authorized to remove is that which exceeds the appropriate management level, which is the optimum thriving natural ecological balance and avoids a deterioration of the range.

An "appropriate management level" established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be sustained under 16 U.S.C. § 1333(b)(2) (1982). The statute does not authorize the removal of wild horses to achieve an appropriate management level which was established for administrative reasons rather than in terms of the optimum number of animals which results in a thriving natural ecological balance and avoids a deterioration of the range.

Craig C. Downer, 111 IBLA 332 (Oct. 31, 1989)

A decision of BLM to remove wild horses from a herd management area will be set aside where the removal decision is not properly based on a finding supported by the record that removal is necessary to restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros

WILD FREE-ROAMING HORSES AND BURROS ACT--Continued

Act, as amended, 16 U.S.C. § 1333(b) (1982).

A decision of BLM to remove wild horses from an area outside a herd area will be sustained where it is consistent with the regulation at 43 CFR 4710.4.

Craig C. Downer, 111 IBLA 339 (Oct. 31, 1989)

WILDERNESS ACT

Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the unit's naturalness qualities and whether an inventory unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreement.

A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1982), will be set aside and the case remanded to BLM where, on appeal, the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite naturalness or outstanding opportunities for solitude or a primitive and unconfined type of recreation, and the record does not adequately support BLM's conclusions on these matters.

Committee for Idaho's High Desert, 85 IBLA 54 (Feb. 11, 1985)

WILDERNESS ACT--Continued

Evaluations made by BLM personnel in the wilderness inventory process are necessarily subjective and judgmental. The conclusions reached must be accorded considerable deference notwithstanding the result might be one over which reasonable men could differ. An appellant seeking reversal must ordinarily show either a clear error of law or a demonstrable error of fact.

Committee for Idaho's High Desert, The Wilderness Society, 85 IBLA 112 (Feb. 14, 1985)

In assessing the presence or absence of wilderness characteristics in an inventory unit, BLM necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome simply by expressions of disagreements.

A BLM decision based on reassessment of the wilderness characteristics of a unit will be reversed where it is established that BLM failed properly to reassess the unit, and it is also established that such failure caused BLM to reach an incorrect conclusion.

Utah Wilderness Ass'n et al., Clive Kincaid, 86 IBLA 89 (Apr. 12, 1985)

BLM may properly reject a proposed modification of an approved plan of operations, seeking to engage in open pit mining within a wilderness study area, where the record establishes that the proposed operation would impair the naturalness of the study area. In addition, BLM may properly require the mining claimant to undertake reclamation of any area affected by unauthorized mining operations.

L. C. Artman et al., 98 IBLA 164 (June 24, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. A Bureau of Land Management decision rejecting geothermal lease offers for lands

WILDERNESS ACT--Continued

within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights. Eugene Water & Electric Board, 98 IBLA 272 (July 10, 1987)

Lands designated by Congress as a component of the National Wilderness Preservation System pursuant to the provisions of the Wilderness Act of 1964, P.L. 88-577, 78 Stat. 890, 16 U.S.C. §§ 1131-1136 (1982), are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984, subject to valid existing rights then existing.

The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. Where oil and gas leases were inadvertently issued for lands that had been designated by Congress as wilderness before issuance of the lease, the Bureau of Land Management properly cancels the lease as to those lands.

Hanes M. Dawson, Don F. Hugus, Jr., 101 IBLA 315 (Mar. 17, 1988)

Sec. 4(d)(7) of the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. § 1133(d)(6), provides that nothing in that Act shall constitute an express or implied claim or denial of exemption from State water law.

The legislative history of sec. 4(d)(7) establishes that its purpose was to preclude assertion of reserved water rights based upon wilderness designation, while preserving reserved rights which antedated such designation.

Designation of Federal lands as wilderness establishes wilderness purposes as "supplemental," not primary, purposes of the lands in question.

Designation of Federal lands as wilderness does not give rise to reserved Federal water rights under the Wilderness Act.

Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III) (July 26, 1988) 96 I.D. 211

WILDERNESS ACT--Continued

There is no time limit within which a decision to reject a lease offer or to issue a lease must be made. An oil and gas lease offer filed for lands which are are subsequently designated by Congress as a component of the National Wilderness Preservation System are withdrawn from disposition under the mineral leasing laws effective Jan. 1, 1984. As the filing of an oil and gas lease offer creates no entitlement to a lease, a BLM decision rejecting oil and gas lease offers for lands within a designated wilderness area will be affirmed in the absence of a showing of valid existing rights.

Thomas J. Florence, 103 IBLA 255 (July 27, 1988)

BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area when the record supports the conclusion that the road would impair the suitability of the area for preservation as wilderness, contrary to provision of 43 U.S.C. § 1782(c) (1982).

Ralph E. Pray, 105 IBLA 44 (Oct. 17, 1988)

Mining operations within wilderness study areas must be conducted under properly filed and approved plans of operations. Where a claimant appeals a notice of noncompliance, and on review the record establishes that operations being conducted exceed those authorized by BLM, and described in the plan of operations, the case will be remanded for the filing of a proper plan of operations and the posting of bond to ensure reclamation of the site after operations are completed.

Robert E. Oriskovich, 106 IBLA 93 (Dec. 13, 1988)

WILDLIFE REFUGES AND PROJECTS

(See also Exchanges of Land, Migratory Bird Conservation Act--if included in this Index.)

## GENERALLY

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

## LEASES AND PERMITS

Generally, unless the mineral leasing laws or a withdrawal or reservation order specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing, if issuance of a mineral lease would not be inconsistent with or interfere with the purpose for which the lands are withdrawn or reserved.

Pursuant to sec. 137 of the 1984 Continuing Resolution, 97 Stat. 981, and Instruction Memorandum No. 84-171, lease offers filed prior to Nov. 14, 1983, for any land within a unit of the National Wildlife Refuge System, outside of Alaska, must be kept in suspense, until such time, if ever, that changes to the applicable regulations are promulgated and an environmental impact statement is prepared.

TXO Production Corp., 87 IBLA 85 (May 29, 1985)



WITHDRAWALS AND RESERVATIONS--ContinuedGENERALLY--Continued

Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

B. J. Toohey, C. D. Toohey, & C. W. Toohey, 88 IBLA 66 (July 23, 1985)

David Cavanagh & Gary McCarthy, 89 IBLA 285 (Nov. 8, 1985) 92 I.D. 564

Where the Government stipulates on appeal that a protective withdrawal noted on the public lands records in 1965 was merely temporary, as alleged by appellant seeking to prove that under the Pickett Act, 43 U.S.C. §§ 141-142, (1970) the temporarily withdrawn lands were open to location for metalliferous minerals, the Board will defer to the parties' agreement as to the nature of the withdrawal. That the withdrawal is found to be merely temporary does not alter the fact that the general public was led to believe otherwise by virtue of the withdrawal's notation on the public land records, and, under the "tract book" or "notation rule" principle, the existence of a withdrawal entry on these records, whether valid or invalid, bars any conflicting appropriation of the land.

Northwest Exploration, Inc. (On Judicial Remand), 89 IBLA 189 (Oct. 17, 1985)

Under 43 U.S.C. §§ 155-158 (1982), known as the Engle Act, the Secretary of the Interior is authorized to process Department of the Defense applications for national defense withdrawals. Where such applications aggregate 5,000 acres or more for any one project or facility, the withdrawal may only be made by an Act of Congress, except in time of war or national emergency, and except as otherwise expressly provided in the Act.

Dept. of the Army, 95 IBLA 52 (Dec. 19, 1986)

WITHDRAWALS AND RESERVATIONSGENERALLY

An application to purchase a headquarters site is properly rejected where the applied-for land is not unreserved public land because the land has been segregated from all forms of appropriation under the public land laws under a prior recreation and public purpose classification pursuant to the Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1982).

Mary S. Brandt, 85 IBLA 140 (Feb. 20, 1985))

To establish that a location of a mining claim made after a withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of the claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

Russell Hoffman (On Reconsideration), 87 IBLA 146 (June 11, 1985)

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the Federal Register. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the Federal Register notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal

WITHDRAWALS AND RESERVATIONS--ContinuedGENERALLY--Continued

No formal withdrawal is necessary to "withdraw and convey" lands out of the National Wildlife Refuge System pursuant to sec. 14(h)(7) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(7) (1982), because the primary purpose of a withdrawal under the Act is to protect the Native claimant from creation of an intervening interest in the property. No such protection is necessary as the lands have previously been withdrawn for wildlife refuge purposes.

U.S. Fish & Wildlife Service, Rust's Flying Service, Alaska Chapter of the Sierra Club, 97 IBLA 367 (May 27, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

A withdrawal of land made under the authority of the Pickett Act remains in effect until revoked.

The standard for distinguishing under the Pickett Act whether a mineral deposit is metalliferous or non-metalliferous is that if the deposit contains a metal chemically and physically akin to the primary metals and is worked essentially for the production of that metal, which is extracted and used in the trades as such, the deposit is metalliferous. If the minerals contained in the deposit contain metals but are extracted and used mainly in the form of compounds with other elements, the deposit is nonmetalliferous.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

WITHDRAWALS AND RESERVATIONS--ContinuedGENERALLY--Continued

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio.  
Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a power-site classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

The Secretary of the Interior has authority to cancel an oil and gas lease issued for lands not subject to leasing at the time of lease issuance. However, where BLM cancels a lease on the basis that oil and gas leasing had been suspended for the lands described in the lease in a previous agreement between BLM and the Forest Service, and it is subsequently shown that the suspension agreement was an improper withdrawal of Federal lands because the agencies failed to follow statutory withdrawal procedures in 43 U.S.C. § 1714 (1982), and the lands described in the lease are otherwise subject to

WITHDRAWALS AND RESERVATIONS--ContinuedGENERALLY--Continued

leasing, it is improper to cancel the lease on the grounds the lands were not subject to leasing.

Clayton W. Williams, Jr., Exxon Corp., 103 IBLA 192  
(July 25, 1988) 95 I.D. 102

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 4601-18(c) (1982) cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

An attempt to relocate a mining claim upon lands withdrawn from the operation of the mining law in 1972 by a State of Alaska land selection was ineffective to establish a relocated claim upon the segregated land.

Russell Hoffman v. Bureau of Land Management, 104 IBLA 238 (Nov. 4, 1988)

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedGENERALLY--Continued

A decision vacating approval of a Native allotment application will be set aside if the record is insufficient to justify the conclusion that lands withdrawn by Exec. Order No. 2089 embrace the lands identified in an application.

Ramona Field, 110 IBLA 367 (Sept. 14, 1989)

AUTHORITY TO MAKE

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority, and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

EFFECT OF

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

Silver Buckle Mines, Inc., 84 IBLA 306 (Jan. 7, 1985)

BLM properly determined that unpatented mining claims were null and void ab initio when they were located at a time when the land was withdrawn from mineral entry by Executive order for a military reservation and the withdrawal has not been revoked, even if the land is no longer being used for military purposes.

Guadalupe Resources Corp., 84 IBLA 344 (Jan. 16, 1985)



WITHDRAWALS AND RESERVATIONS--Continued

## EFFECT OF--Continued

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. The "date of location" of a mining claim is determined by reference to the laws of the state in which the claim is located.

John F. Malone et al., 86 IBLA 85 (Apr. 11, 1985)

Mining claims located on land previously withdrawn from mineral entry by Exec. Order No. 5327 and Public Land Order No. 4522 are properly declared null and void ab initio.

Azome Utah Mining Co., 86 IBLA 170 (Apr. 25, 1985)

Sec. 14(h)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(h)(1) (1982), authorizes the Secretary of the Interior to withdraw and convey existing historical places and cemetery sites to the appropriate regional corporation. A historical site application is properly rejected where the subject land was withdrawn by Public Land Order No. 5180, pursuant to 43 U.S.C. § 1616(d)(1) (1982), or withdrawn by Public Land Order No. 5250, pursuant to 43 U.S.C. § 1616(d)(2) (1982).

Bering Straits Native Corp., 87 IBLA 96 (May 30, 1985)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn from appropriation under the mining laws. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Raymond D. Dilley, 87 IBLA 150 (June 11, 1985)

WITHDRAWALS AND RESERVATIONS--Continued

## EFFECT OF--Continued

BLM may properly declare a mining claim located on land withdrawn and closed to mineral entry null and void ab initio. The location date for such mining claim will not relate back to a mining claim located prior to the withdrawal where the previous mining claim was conclusively presumed to be abandoned and void pursuant to sec. 314(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(c) (1982), for failure to record the notice of location in a timely manner.

McCarthy Mining & Development Co., 87 IBLA 172 (June 13, 1985)

Mining claims located on land closed to entry and location under the mining laws by a withdrawal order of the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act are null and void ab initio; however, where such a withdrawal order does not specifically close the land to mineral location, but only to mineral leasing, and there is no indication that mineral location was to be foreclosed, the withdrawal order will not be held to preclude mineral location.

Whelan's Mining & Exploration, Inc., 88 IBLA 336 (Sept. 19, 1985)

Where the official records of the Department disclose that mining claims were located on land withdrawn from location under the mining law, those claims are null and void ab initio, and the fact that the withdrawal was overlooked in an earlier proceeding does not bar the Department from later asserting the withdrawal.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

WITHDRAWALS AND RESERVATIONS--Continued

## EFFECT OF--Continued

A mining claim located on land withdrawn from mineral entry at the time of location is properly declared null and void ab initio. BLM owes no duty to mining claimants to promptly ascertain the legal status of every claim filed and inform such claimants of its findings.

John R. & Vickie L. Malone, 89 IBLA 341 (Nov. 13, 1985)

BLM may properly declare a mining claim located on lands withdrawn and closed to mineral entry null and void ab initio.

Alexander & Martha Acker, 90 IBLA 1 (Nov. 27, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

George E. Krier, 92 IBLA 101 (May 30, 1986)

A mining claim is properly declared null and void if, at the time of location, the land is withdrawn or segregated from appropriation under the mining laws. Where, following location of the claim, the segregative effect of a proposed withdrawal terminates, such termination does not operate to validate retroactively the location made while the lands were segregated from mineral entry.

Harold E. De Roux, 94 IBLA 350 (Nov. 28, 1986)

A mining claim located on land segregated and closed to mineral entry by notation of an application for withdrawal on the official BLM records is null and void ab initio.

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not

WITHDRAWALS AND RESERVATIONS--Continued

## EFFECT OF--Continued

consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

In the absence of favorable action upon a petition to designate the land as suitable for desert land entry, an application for a desert land entry will not be considered a valid existing right excepted from a subsequent withdrawal order, and the application must be rejected by BLM, regardless of any challenge to the propriety and efficacy of the subsequent withdrawal.

Richard S. Gregory, 96 IBLA 256 (Mar. 25, 1987)

BLM may properly reject a desert land entry application where, prior to classification of the lands sought and prior to the entry being allowed, the lands have been withdrawn by a public land order as part of the Snake River Birds of Prey Area.

Diane M. Jensen, Odell M. Smith, Jr., 97 IBLA 23 (Apr. 23, 1987)

Byron V. Anderson, 97 IBLA 105 (Apr. 29, 1987)

While failure to record a mining claim as required by State law does not, in and of itself, render the claim invalid, other events, such as a withdrawal or classification of the land by the United States, prior to any corrective action by the claimant, may operate as an adverse right which will make the claim invalid.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

WITHDRAWALS AND RESERVATIONS--ContinuedEFFECT OF--Continued

An application for a desert land entry is properly rejected where the lands at issue were previously classified as suitable for desert land entry but no entry was allowed under the application prior to withdrawal of the lands from entry under the Desert Land Act.

Gerald W. Marlin et al., 98 IBLA 128 (June 19, 1987)

A notice of location of a headquarters site is properly rejected where at the time of filing the land involved is not unreserved public land because it had been withdrawn from all forms of appropriation under the public land laws by Public Land Order No. 5418 for classification and protection of the public interest.

Mark L. Whitman, 98 IBLA 391 (Aug. 5, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

Publication of the notice of a withdrawal application in the Federal Register segregates the lands described in the application from settlement, sale, location, or entry under the general land laws, including the mining laws, to the extent specified in the notice.

A lode claim located on land segregated and closed to mineral entry by publication of notice of an application for withdrawal of the land in the Federal Register is properly declared null and void ab initio. Coeur Explorations, Inc., 100 IBLA 293 (Dec. 22, 1987)

WITHDRAWALS AND RESERVATIONS--ContinuedEFFECT OF--Continued

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

Public Land Order No. 5251 continued in effect the withdrawal of lands in Alaska from location and entry under the mining laws that was initiated by the earlier Public Land Order No. 5179.

Maple Leaf Gold, Inc., et al., 101 IBLA 158 (Feb. 10, 1988)

Mining claims located on lands that are withdrawn from mineral entry both by an act of Congress and by a duly published public land order on the date of location are properly declared null and void ab initio.

Where lands covered by mining claims are withdrawn from future entries "subject to valid existing rights," the withdrawal attaches, as of the date of the withdrawal, to all land described by the withdrawal, including the lands covered by the mining claims. So long as the claims are valid, however, the withdrawal is ineffective. However, when the claims terminate, the withdrawal becomes effective, eo instanti, to the lands covered by the entry, thus closing them to future entries. No further action is required to effect the withdrawal.

The location date for mining claims situated on lands withdrawn from mineral entry by Congress for inclusion in the Wrangell-St. Elias National Park will not relate back to mining claims located prior to the withdrawal, where the previous mining claims were conclusively deemed to be abandoned and void for failure to file copies of proofs of labor or notices of intent



WITHDRAWALS AND RESERVATIONS--ContinuedEFFECT OF--Continued

to hold as required by sec. 314 of the Federal Land Policy and Management Act of 1976.

Jack Stanley, 103 IBLA 392 (Aug. 15, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a first-form reclamation withdrawal, which segregated a tract from mineral entry thereby reinstating the terms of the withdrawal, a mining claim subsequently located on that tract is properly declared null and void ab initio.

George & Reda Howard, 104 IBLA 114 (Aug. 31, 1988)

Placer mining claims are properly declared null and void ab initio if, at the time of location, the land is withdrawn from prospecting, location, entry, and purchase under the mining laws of the United States.

Revocation of a withdrawal of lands subsequent to the date of location of placer mining claims will not retroactively validate those claims.

Kathryn J. Story, 104 IBLA 313 (Sept. 15, 1988)

If any part of a lode mining claim is located on lands open to mineral entry, it cannot be deemed null and void ab initio because a portion of the claim is also on withdrawn lands.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

Mining claims located on land which has been segregated from appropriation under the mining laws by publication in the Federal Register of a notice of classification under the Classification and Multiple Use Act of 1964 are properly declared null and void ab initio. A subsequent modification or revocation of the classification order will not retroactively

WITHDRAWALS AND RESERVATIONS--ContinuedEFFECT OF--Continued

validate locations made while the lands were segregated from mineral entry.

Pluess-Stauffer (California), Inc., 106 IBLA 198 (Dec. 21, 1988)

BLM properly declares a placer mining claim null and void ab initio where it was located within one-quarter mile of a wild river clearly designated prior to the date of location by the Secretary of the Interior under the Wild and Scenic Rivers Act, as amended, 16 U.S.C. §§ 1271-1287 (1982), and thereby statutorily withdrawn from appropriation under the mining laws.

Andrew Van Atta, Mindy Wekselblatt, 106 IBLA 304 (Jan. 5, 1989)

A lode mining claim is properly declared null and void ab initio if, at the time of location, the land was withdrawn from appropriation under the mining laws of the United States.

George A. Sullivan, 107 IBLA 287 (Feb. 23, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedEFFECT OF--Continued

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are closed to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

A mining claim located in part on land withdrawn from appropriation under the mining laws is null and void ab initio in part.

Oscar E. Harding, 110 IBLA 117 (Aug. 7, 1989)

Where an Executive Order withdrawing land from appropriation specifies that it is issued pursuant to the authority, and subject to the conditions of, the Act of June 25, 1910, the land described in the withdrawal is open to exploration, discovery, occupation, and purchase under the mining laws, so far as they apply to metalliferous minerals.

N. W. Brown, 112 IBLA 225 (Dec. 19, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedPOWERSITES

Lands covered by a preliminary permit issued to a prospective licensee by the Federal Energy Regulatory Commission are not open to mineral location, and mining claims made on such lands are properly declared null and void ab initio.

The fact that a permittee may not ultimately use all of the land encompassed in his preliminary permit does not alter the fact that land embraced by the permit is not open to location.

Robert Farchi, 88 IBLA 273 (Sept. 5, 1985)

A mining claim located prior to Aug. 11, 1955, on lands withdrawn for a powersite is null and void ab initio. The passage of the Mining Claims Rights Restoration Act of Aug. 11, 1955, 30 U.S.C. § 621 (1982) did not give life to void claims which had been located on withdrawn lands prior to the date of the Act.

Fairfield Mining Co., Inc., 89 IBLA 209 (Oct. 25, 1985)

BLM may properly declare a lode mining claim null and void ab initio where it was located entirely on land which had been patented without a mineral reservation to the United States or was subject to a license for a power project under a powersite withdrawal and the land has not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). However, where the record is unclear as to the exact situs of the claim on the ground and the claim may partially cover land which is open to mineral entry, the case will be remanded to BLM to first determine the location of the claim and then to adjudicate the claim accordingly.

Leslie Corriea, 93 IBLA 346 (Sept. 11, 1986)

WITHDRAWALS AND RESERVATIONS--ContinuedPOWERSITES--Continued

Lands withdrawn for a powersite reservation, with certain exceptions, are open to entry for location and patent of mining claims with a reservation of power rights in the lands to the United States subject to the Mining Claims Rights Restoration Act. Where the BLM decision declaring mining claims null and void did not consider the effect of this Act on the withdrawal, the decision will be set aside and the case remanded for appropriate action.

Lamar & Christine Burnett, 94 IBLA 374 (Dec. 4, 1986)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a powersite classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

Under the preliminary injunction order issued in Nat'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedPOWERSITES--Continued

Lands which are covered by a preliminary permit issued by the Federal Energy Regulatory Commission for a proposed power project are not open to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(a) (1982), unless the land has been restored to entry under sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982). Where a mining claim is located at a time when the lands are restored to entry under sec. 2(a) of the Mining Claims Rights Restoration Act, BLM properly declares the claim null and void ab initio.

Phillip L. Heintz, 108 IBLA 330 (May 2, 1989)

BLM properly declares a placer mining claim null and void ab initio where it was located on land subject to a license for a power project under a powersite withdrawal and the land had not been restored to mineral entry in accordance with sec. 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1982).

John Wright, 112 IBLA 233 (Dec. 20, 1989)

RECLAMATION WITHDRAWALS

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)



WITHDRAWALS AND RESERVATIONS--ContinuedRECLAMATION WITHDRAWALS--Continued

A mining claim located on lands which are withdrawn for reclamation purposes under the first form is null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding the repeal of the statute authorizing the initiation of such withdrawals.

William B. Rawlings, 85 IBLA 243 (Mar. 4, 1985)

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal is null and void ab initio.

Maynard C. Campbell, Jr., 85 IBLA 295 (Mar. 13, 1985)

George C. Castle, Carlyle Castle, 90 IBLA 30 (Dec. 5, 1985)

A mining claim is properly declared null and void if the land at the time of the location is withdrawn from appropriation under the mining laws by a first-form reclamation withdrawal. Once land has been withdrawn from mineral entry, it remains withdrawn until the withdrawal is formally revoked. It is immaterial whether the lands are or will be used for the purpose for which they are withdrawn.

Florian L. Glineski, Mike Gilleran, 87 IBLA 266 (June 25, 1985)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness

WITHDRAWALS AND RESERVATIONS--ContinuedRECLAMATION WITHDRAWALS--Continued

to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)

It is proper to declare mining locations null and void ab initio where the locations were not perfected by performance of the condition precedent set forth in the order opening lands in a reclamation withdrawal to mineral location and entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982).

Thomas L. Lee, 98 IBLA 149 (June 22, 1987)

Mining claims located on lands withdrawn for reclamation purposes under the first form are null and void ab initio. A first-form reclamation withdrawal completed prior to Oct. 21, 1976, remains in effect, subject to review by the Secretary, notwithstanding repeal of the statute authorizing the initiation of such withdrawals.

Frank David Hill, 99 IBLA 16 (Aug. 14, 1987)

Leo & Florence Whiteman, 107 IBLA 118 (Feb. 2, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedRECLAMATION WITHDRAWALS--Continued

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Harges Mining Co., 102 IBLA 169 (May 3, 1988)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a first-form reclamation withdrawal, which segregated a tract from mineral entry thereby reinstating the terms of the withdrawal, a mining claim subsequently located on that tract is properly declared null and void ab initio.

George & Reda Howard, 104 IBLA 114 (Aug. 31, 1988)

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery"

WITHDRAWALS AND RESERVATIONS--ContinuedRECLAMATION WITHDRAWALS--Continued

prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154 (Sept. 6, 1988) 95 I.D. 142

When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification of the withdrawal. In this case, the transfer of administrative jurisdiction of previously withdrawn lands from the Department of the Interior to the Department of Agriculture pursuant to the authority granted by 16 U.S.C. § 460j-18(c) (1982), cannot be construed as a formal revocation or modification of the withdrawal opening the lands to mineral entry. The Department of the Interior retained jurisdiction to the extent necessary for the operation of the reclamation project and other reclamation purposes.

James N. McDaniel, 105 IBLA 40 (Oct. 14, 1988)

A mining claim located on lands subject to a first-form withdrawal at the time of location is null and void ab initio.

Stewart L. Ashton, 107 IBLA 140 (Feb. 6, 1989)

WITHDRAWALS AND RESERVATIONS--Continued

## REVOCATION AND RESTORATION

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, including preparation of a mineral report, where it appears warranted by the appellant's showings and willingness to accept terms and conditions to protect the Government's interest.

Robert Limbert, Otis Schoolcraft, 85 IBLA 131 (Feb. 19, 1985)

Equitable title vests in preference right applicants for public lands restored in accordance with 43 U.S.C. § 971a - e (1982) and Public Land Order No. 1613, when they have paid the purchase price and received a receipt from BLM, and BLM may properly grant them patents even though they have subsequently sold the lands adjoining the public lands.

Robert & Patricia Bailey et al., 89 IBLA 369 (Nov. 22, 1985)  
92 I.D. 606

The Board of Land Appeals does not have the authority to modify the terms of a properly issued public land order selectively revoking a withdrawal.

Dinyea Corp., 90 IBLA 163 (Jan. 8, 1986)

BLM properly rejects PLO 1613 applications to purchase lands adjoining lands that were not in private ownership or in a pending application on Apr. 7, 1958.

United Methodist Church et al., 92 IBLA 318 (June 26, 1986)

WITHDRAWALS AND RESERVATIONS--Continued

## REVOCATION AND RESTORATION--Continued

Land withdrawn as a military reservation and subsequently returned by Executive order to the jurisdiction of the Department of the Interior for disposition under the authority of the Act of July 5, 1884, ch. 214, 23 Stat. 103, is not thereby restored to the operation of the public land laws generally. Such land is not vacant, unappropriated, and unreserved, and hence, a Native allotment application filed for such land alleging use and occupancy commencing after the date of the withdrawal is properly rejected.

Harold Ahmasuk et al., 96 IBLA 42 (Feb. 27, 1987)

Ordinarily an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management where the Bureau of Reclamation recommends against restoration. However, on appeal, a case may be remanded for further consideration by the appropriate agencies, where it appears warranted by the appellant's allegations concerning valuable minerals and an expressed willingness to accept terms and conditions to protect the Government's interest.

John Yule, 96 IBLA 379 (Apr. 14, 1987)

Where a BLM decision to reject an application to restore land withdrawn for reclamation purposes to mineral entry was based on a Bureau of Reclamation recommendation which did not explain how restoration would pose a threat of water quality degradation or indicate that restoration could not be made subject to reservations or execution of a contract by the entryman adequate to protect the public interest, the Board will set aside the BLM decision and remand the case for further consideration by the appropriate agencies.

Kenneth Carter, 98 IBLA 100 (June 12, 1987)



WITHDRAWALS AND RESERVATIONS--Continued

## REVOCATION AND RESTORATION--Continued

Lands withdrawn from entry under some or all of the public land laws remain withdrawn until there is a formal revocation or modification of the order of withdrawal. Where a public land order withdrawing lands from location of mining claims for metalliferous minerals is expressly amended by a subsequent public land order deleting certain lands from the withdrawal, a decision declaring mining claims located thereafter for precious metals on lands deleted from the withdrawal to be null and void ab initio will be reversed.

Harry J. Ayala, 99 IBLA 19 (Aug. 17, 1987)

BLM properly declares a mining claim null and void ab initio and rejects a mineral patent application therefor when the evidence establishes the claim was located prior to revocation of a first-form reclamation withdrawal.

Lynn H. Grooms et al., 99 IBLA 237 (Oct. 19, 1987)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a small tract classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim subsequently located on land subject to that injunction is properly declared null and void ab initio.

Chester C. Reddeman, 101 IBLA 33 (Jan. 25, 1988)

Where public lands have been withdrawn from location of mining claims under a first-form reclamation withdrawal, no mining claim may be located thereon until there has been a formal revocation of the withdrawal or restoration of the land to mineral entry. A mining claim located on such lands prior to restoration is properly declared null and void ab initio regardless of the locator's agreement to abide by the

WITHDRAWALS AND RESERVATIONS--Continued

## REVOCATION AND RESTORATION--Continued

conditions imposed by the Bureau of Reclamation as a condition of restoration.

Paul J. DesFosses, Harges Mining Co., 102 IBLA 169 (May 3, 1988)

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a power-site classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and thus, did not serve as a proper basis for the rejection of the application.

James A. Maleski, 102 IBLA 175 (May 3, 1988)

In almost every case an application to restore lands within a reclamation withdrawal to mineral entry pursuant to the Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), will be rejected by the Bureau of Land Management when the Bureau of Reclamation recommends against restoration. If the record on appeal contains cogent reasons for the Bureau of Reclamation rejection and states a logical basis for a finding that, for the lands in question, the interests of the United States could not be protected by the imposition of limitations provided by the Act and other laws applicable to mining operations, the determination will be affirmed by this Board.

The Act of Apr. 23, 1932, 43 U.S.C. § 154 (1982), gives the Secretary of the Interior authority to open lands subject to a reclamation withdrawal to mineral entry if the lands are known or believed to be valuable minerals sufficient to support a "discovery"

WITHDRAWALS AND RESERVATIONS--ContinuedREVOCATION AND RESTORATION--Continued

prior to opening the lands. All that need be determined is whether it may reasonably be believed that the lands contain valuable minerals.

When the Bureau of Land Management has conducted a mineral examination to determine whether the lands are known or believed to be valuable for minerals and, based upon that examination, has concluded that the lands are not known or believed to be valuable for minerals, an appellant must prove by a preponderance of the evidence that the Bureau of Land Management determination is incorrect.

Robert Limbert, Otis Schoolcraft, 104 IBLA 154 (Sept. 6, 1988)  
95 I.D. 142

Under the preliminary injunction order issued in Natl'l Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded from terminating powersite classifications and restoring lands described in a desert land entry application.

James A. Malesky (On Reconsideration), 106 IBLA 327 (Jan. 9, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of reinstating the terms of a revoked reclamation withdrawal, which had precluded the location of mining claims, a mining claim located the day before the effective date of the preliminary injunction is not null and void ab initio, since on the date of location, the lands were open to the operation of the mining laws.

Harold Bennett et al., 107 IBLA 291 (Feb. 24, 1989)

Where a Federal district court issues a preliminary injunction which has the effect of suspending the termination of a multiple-use classification which segregated the land from mineral entry, thereby reinstating the terms of the classification, a mining claim

WITHDRAWALS AND RESERVATIONS--ContinuedREVOCATION AND RESTORATION--Continued

subsequently located on land subject to that injunction is properly declared null and void ab initio.

Art Marinaccio, 107 IBLA 303 (Mar. 2, 1989)

SPRINGS AND WATERHOLES

Reservation of Federal water rights may be implied only to the extent previously unappropriated water is necessary to the primary purposes of the withdrawal and reservation of land.

A finding of implied reservation of water rights requires a determination that reservation of water was the actual, albeit unexpressed, intent of Congress.

Federal Reserved Water Rights in Wilderness Areas, M-36914 (Supp. III) (July 26, 1988)  
96 I.D. 211

STATE SELECTIONS

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of an application by the State of Alaska to select lands segregates those lands from all subsequent appropriation, including location under the mining law. A mining claim located on land segregated and closed to mineral entry is properly declared null and void ab initio.

Thomas C. Bay, Joyce R. Bay, 87 IBLA 194 (June 13, 1985)

Perlia J. Strassburg, Wilford D. Strassburg, 92 IBLA 1 (Apr. 30, 1986)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of a state selection application, null and void ab initio, where the claim cannot relate back to a date of location prior to the segregation because the original location is deemed abandoned and void for failure to record timely under

WITHDRAWALS AND RESERVATIONS--ContinuedSTATE SELECTIONS--Continued

sec. 314(b) of the Federal Land Policy and Management of 1976, 43 U.S.C. § 1744(b) (1982).

Ed Bilderback, 90 IBLA 319 (Feb. 25, 1986)

BLM may properly declare a mining claim null and void ab initio where it was located at a time when the land was segregated from mineral entry pursuant to 43 CFR 2627.4(b) by virtue of the filing of a state selection application, and there is no evidence that the claim is an amendment of a location which predates that filing.

Rodney D. Jackson, Vernon E. Griffin, 92 IBLA 87 (May 28, 1986)

An application to make homestead entry on land subject to a properly filed State selection application under the Alaska Statehood Act is properly rejected.

Bernard J. Eberhardt, 95 IBLA 216 (Jan. 14, 1987)

BLM may properly declare a mining claim located on land segregated from mineral entry, pursuant to 43 CFR 2627.4(b), by virtue of the filing of an Alaska State selection application, null and void ab initio when there is no showing that the claim relates back to a date of location prior to the segregation.

Sec. 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), amended the Alaska Statehood Act to permit the State to file new applications to include lands which were not vacant, unappropriated, and unreserved at the time the sec. 906(e) "top filing" application was filed. Such State selection applications become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Lands subject to valid mining claims on the date a state "top filing" application is filed become subject to state selection when the claims are abandoned, either intentionally or by action of law.

Vernon F. Miller, 110 IBLA 20 (July 6, 1989)

WITHDRAWALS AND RESERVATIONS--ContinuedTEMPORARY WITHDRAWALS

A withdrawal of land made under the authority of the Pickett Act remains in effect until revoked.

David E. Hoover & Lester F. Whalley, 99 IBLA 291 (Oct. 26, 1987)

WORDS AND PHRASES

"Interest in an oil and gas lease or offer." Where an applicant for an oil and gas lease has executed a note entitling the holder to 60 percent of the proceeds from a Federal oil and gas lease, the holder of the note has an interest in the oil and gas lease pursuant to 43 CFR 3100.0-5(b) (1982).

Joshua Basin Partnership, Taylor Basin Partnership, Shasta Basin Partnership, Mesozoic-Paleozoic Joint Venture, 87 IBLA 179 (June 13, 1985)

"Protraction survey" or "protraction diagram." A "protraction survey" or "protraction diagram," which consists of lines drawn on a map that follow the public land survey system, but which is not based upon a field survey with monumentation, is not an official survey and therefore the requirement that a placer mineral patent application be accompanied by a mineral survey of the unsurveyed land is not waived when the unsurveyed land is covered by a protraction survey.

Dennis J. Kitts, 84 IBLA 338 (Jan. 15, 1985)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition



WORDS AND PHRASES--Continued

for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

Richard G. Fowler, 89 IBLA 175 (Oct. 11, 1985)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-1(c). A tender of rental payment is made only when a lessee submits payment to the BLM office administering his lease, providing BLM with the opportunity either to receive or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a class I reinstatement of an oil and gas lease.

William E. Phalen, 85 IBLA 151 (Feb. 25, 1985)

Oscar D. Graham, 91 IBLA 394 (Apr. 29, 1986)

"Timely filed." Under 43 CFR 3833.0-5(m), for the purpose of determining whether the annual filing mandated by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), is timely filed, the phrase "timely filed" is defined to mean "being filed within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law."

Buck Wilson, 89 IBLA 143 (Oct. 1, 1985)

"Improvements." As used in sec. 905(a)(5)(C) of ANILCA, the term "improvements" does not carry any special meaning, but rather has its legal meaning in relation to real property. Thus, an improvement must enhance the present value of the land.

Eugene M. Witt, 90 IBLA 330 (Feb. 26, 1986)

WORDS AND PHRASES--Continued

"Municipal utility." A municipal utility is a political subdivision or agency of a political subdivision which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service.

City of Redding, 91 IBLA 82 (Mar. 11, 1986)

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment within the meaning of 43 CFR 3108.2-2(a)(1). A tender of rental payment is made only when payment is received by the proper office administering the lease, providing that office the opportunity either to accept or decline payment. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a petition for a Class I reinstatement of an oil and gas lease.

Jerald A. Waters, 94 IBLA 150 (Oct. 23, 1986)

"Transmit." Regulation 43 CFR 3451.1(c)(2) provides that BLM waives its right to readjust a coal lease if it fails to "transmit" the lease terms within 2 years of the notice of intent to readjust the lease. "Transmit" as used in this regulation, means "to send." Therefore, where BLM deposits the proposed readjusted lease terms in the mail within 2 years of the notice, BLM may readjust the lease, even when the proposed lease terms are received by the lessee more than 2 years after the notice.

Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (Aug. 15, 1986)

"Date of location." The "date of location" of a mining claim is "the date determined by State law in the local jurisdiction in which the unpatented mining claim, mill or tunnel side is situated." 43 CFR 3833.0-5(h). Absent clear evidence to the contrary in a specific case, under Alaska State law the date of location of a mining claim is the date notice is posted

WORDS AND PHRASES--Continued

on the claim as recited in the recorded certificate of location.

Dutch Creek Mining Co., 98 IBLA 241 (July 6, 1987)

"Date of location." The date of location of a mining claim is determined in accordance with the law of the state where the claim is situated. Under Utah law, the date of location is that date specified in the notice of location posted on the mining claim and in the copy of the notice of location filed with the county recorder's office.

Kerry Shumway, 99 IBLA 156 (Sept. 25, 1987)

"Dwelling." Under 43 CFR 2653.8-2(b)(1) a "dwelling" is a house or other structure in which a person or persons live, reside, or habitate. A structure useable only as an emergency shelter is not a dwelling for purposes of this regulation.

United Forest Service, 98 IBLA 157 (June 24, 1987)

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Scott Burnham, 100 IBLA 94 (Dec. 2, 1987) 94 I.D. 429

"Notation rule." Where an Alaska Native corporation files an application to select land pursuant to the Alaska Native Claims Settlement Act, the filing of the application ordinarily will segregate the selected land from any subsequent appropriation under the public land laws and mineral laws until the application is rejected or withdrawn. However, where such an application is irregular on its face in that the land selected is not legally subject to such selection

WORDS AND PHRASES--Continued

under the provisions of the statute, and no notation of the selection application is made upon the official title and status records of the selected land, the segregative effect of the application is not operative, and mining claims located on the land while such application was pending may not be deemed null and void ab initio.

Donald H. Hale, 96 IBLA 368 (Apr. 10, 1987)

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

Angeline Galbraith, 97 IBLA 132 (May 6, 1987)  
94 I.D. 151

"Adverse party." An "adverse party" to a case is one who will be disadvantaged if the agency decision is appealed and if the appellant prevails. A party who is determined by BLM to have priority for two oil and gas leases over another party will be disadvantaged if the latter prevails on an appeal to the Board of Land Appeals and should be named as an "adverse party" in the decision rejecting the latter's offer.

Beard Oil Co., 105 IBLA 285 (Nov. 7, 1988)

"Good cause for such failure." As used in 30 CFR 843.12(b), the term "good cause for such failure" of a state regulatory authority to take appropriate action after the receipt of a 10-day notice does not include the legal inability of the agency to act, but rather is limited to a showing either that no violation existed or that the operation was not subject to the provisions

WORDS AND PHRASES--Continued

of the Surface Mining Control and Reclamation Act of 1977.

Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 167 (Feb. 17, 1988)

"Inadvertent." As used in 30 U.S.C. § 188(d) (1982), a failure to timely submit annual rental for an oil and gas lease will be deemed "inadvertent," where the failure was occasioned by forgetfulness or inattention to the requirements of the law. A failure to timely submit the rental will be deemed not to be "inadvertent" only where it is the result of an intentional and knowing choice of the lessee or where the lessee simply lacked the resources to pay the rental.

Torao Neishi, 102 IBLA 49 (Apr. 13, 1988)

"Political subdivision." Although a provision of the Recreational and Public Purposes Act, 43 U.S.C. § 869-1(d) (1982), authorizes issuance of leases for public land to nonprofit corporations, this authority does not extend to revested Oregon and California railroad grant lands which may be leased only to states and counties, state and Federal instrumentalities and political subdivisions, and municipal corporations. A nonprofit corporation which is not a "political subdivision" within the meaning of the Act, is not eligible for such a lease.

Upper Mohawk Community Council, 104 IBLA 389 (Oct. 3, 1988)

"Production." Under 30 U.S.C. § 226(j) (1982), an oil and gas lease committed to a unit or cooperative agreement shall continue in force and effect so long as the lease remains subject to the plan, provided that "production is had in paying quantities under the plan prior to the expiration date of the term of such lease." In 1954, Congress substituted the "production" requirement for the prior requirement for a "discovery," and enacted a separate provision for the tenure of a

WORDS AND PHRASES--Continued

lease on which there was no actual production but only a well capable of production.

Hiko Bell Mining & Oil Co., et al. (On Reconsideration), 100 IBLA 371 (Jan. 15, 1988) 95 I.D. 1

"Registered mail." As used in sec. 109(h) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719(h) (1982), the term "registered mail" embraces either "registered mail, return receipt requested" or "certified mail, return receipt requested."

Texaco, Inc., 102 IBLA 86 (Apr. 14, 1988)

Texaco, Inc., 103 IBLA 75 (June 30, 1988)

"Term." The term of a lease issued pursuant to the Mineral Leasing Act, when used without limitation as in sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209 includes all periods of time between the effective date and the expiration date and means the entire estate demised by the lease.

Suspensions of Operations & Production for Coal Leases Under Sec. 39 of the Mineral Leasing Act, M-36958 (July 14, 1988) 96 I.D. 15

"Adjoining landowners." The term "adjoining landowners," as used in 43 CFR 2711.1-2(b), does not include individuals who own cornering lands, since in the administration of the public land laws the terms "contiguous" or "adjoining" have been consistently defined and construed to exclude "cornering" lands.

Henry J. Warmuth, 108 IBLA 130 (Apr. 3, 1989)

"Endanger" and "materially interfere." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is



WORDS AND PHRASES--Continued

whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

Robert E. Shoemaker, 110 IBLA 39 (July 13, 1989) 96 I.D. 315

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

5M, Inc., 109 IBLA 334 (June 22, 1989)

"Not permissible." As used in 43 CFR 3480.0-5(a)(23), the exclusion of other areas where mining is "not permissible" from the minable reserve base does not encompass areas in which no permit has been obtained, absent a showing that no permit can be obtained.

Atlantic Richfield Co., West Elk Co., 112 IBLA 115 (Nov. 30, 1989)

"Proprietary information." Proprietary information means information, which, if disclosed, would do substantial harm to the competitive position of the outside source from which it was obtained and would inhibit the Government's ability to obtain this type of information in the future, resulting in a substantial detrimental effect on a Government program.

WORDS AND PHRASES--Continued

Internally generated Governmental conclusions and information are not generally proprietary.

B. A. Wilford, 110 IBLA 154 (Aug. 11, 1989)

"Service." A notice of appeal from a decision of the Bureau of Land Management must be filed within 30 days after the person taking the appeal is "served" with the decision from which the appeal is taken. Where BLM mails its adverse decision to an address other than the person's last address of record and the decision is returned by the Postal Service because a forwarding order has expired, the decision has not been constructively "served." In these circumstances, an appeal which is subsequently filed within 30 days of the person's receipt of actual notice of the adverse decision is timely.

Jean Emanuel Hatton, Eva M. Pool, Phillip Emanuel, 107 IBLA 47 (Jan. 27, 1989)

"Workability." Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

American Gilsonite, 111 IBLA 1 (Sept. 19, 1989) 96 I.D. 408















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